United States Court of Appeals
for the Second Circuit

APPENDIX

B

PofS

77-1369

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JOSEPH J. GAY,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK.

APPENDIX FOR DEFENDANT-APPELLANT

UNITED STATES COURT OF APPEALS
FILED
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CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

John T. Curtin

D. C. Form No. 100 Rev.

Docket Entries.

CR-74- 143

TITLE OF CASE	ATTORNEYS
THE UNITED STATES vs. JOSEPH J. GAY Filing false and fraudulent joint income-tax returns, in violation of Title 26, Section 7201, U.S.C.	*For U. S.:* Richard Mellenger *For Defendant:* ~~Charles McDonough~~ Robert Murphy

Offenses: 1968;1969;1970;1971;1972 5 Cts.

STATISTICAL RECORD	COSTS			DATE	NAME OR RECEIPT NO.	REC.		DISB.	
J.S. 2 mailed	Clerk								
J.S. 3 mailed	Marshal								
Violation	Docket fee								
Title 26									
Sec. 7201									

DATE 1974	PROCEEDINGS
Apr. 4	Filed Indictment
Apr. 4	J.S. 2 made
Apr. 16	Proceedings before the Magistrate. Deft. being duly arraigned, enters a plea of not guilty. Bail is set at $5,000 recognizance. Adj. to 5/28/74 for motions
Apr. 17	Filed $5,000 recognizance bond
May 13	Filed Deft's notice of motion for suppression, discovery & inspection, bill of particulars, Brady material, etc, ret. 5/28/1974
May 28	Suppression Hearing to be scheduled when discovery motions before the Magistrate are completed.
June 4	Govt's response to Deft's pre-trial motions
June 4	Proceedings before the Magistrate - Motions - No appearance for Deft. Adj. to 6-18-74, 10:30 a.m. for status report and/or arguement of motion.
June 18	Proceedings before the Magistrate - No appearance for defendant. Atty. for deft. is ill. Adj. 7/16/1974 for status report
July 16	Mr. Mellenger advised that Mr. McDonough is still convalescing. Argument of discovery motion set down for 8/13/74--10:30 a.m. (Proceedings before the Magistrate.)

(OVER)

Docket Entries.

DATE	PROCEEDINGS
1974	
Aug. 13	Proceedings before the Magistrate No appearance for deft. Adj. to 9/17/74 for argument of motions
Sept. 4	Proceedings before the Magistrate No appearance for deft. Atty. Robert Murphy notifi the Magistrate on 9/3 that he will be representing the deft. Argument of motions is scheduled for 9/17/74
Sept. 6	Filed Govt's motion to move action for trial
Sept. 17	Proceedings before the Magistrate- No appearances for deft. Adj. to 10/1/74 for argument and/or status report.
Sept.30	Determination of counsel. Atty. Robert Murphy will be representing deft. Adj. to 10/15/74 for return of motions.
Oct. 1	Proceedings before the Magistrate-No appearance for deft. Adj. to 10/8/74 for argument.
Oct. 8	Proceedings before the Magistrate - No appearance for defendant; The Court advised the Govt. that, by phone, Mr. Murphy had indicated that he has received a notice that this case is on Judge Curtin's calendar for motions on 10/15/1974. If further discovery is required, defendant should so advise the Judge at that time.
Oct. 15	Motion - Counsel advise the Court that a Suppression Hearing will be necessary; the Court will send a notice.
Nov. 4	Suppression Hearing. Adj. 12/2/74 at 2:00 P.M.
Dec. 2	[illegible] Suppression Hearing - Adj. 12/17/1974 3:00 P/M
Dec. 30	Suppression hearing. Adj. to 11:00 am on 12/31/74
Dec. 31	Suppression hearing continued from yesterday with the same appearances. Memos are to be submitted by both sides on or before 1/27/75
1975	
Jan. 27	Last day for counsel to file briefs. Briefs to be filed today.
Jan. 30	Filed Govt's memorandum of law in opposition to defendant's motion to suppress evidence
Feb 24	Return date for briefs. Submitted.
Mar. 7	Filed Decision and Order denying deft's motion to suppress--CURTIN,J.
Apr. 7	Return date for additional motions. No additional motions filed. Adj. to 4/9 at 9:00 for meeting with counsel.
May 13	Filed copy of letter to Robert Murphy from Richard Mellenger dated May 12, 1975 re: examining of marked exhibits.
May 27	Pre trial conference. Adj. to 6/30
June 30	Pre-trial conference. No appearance for deft. Adj. 7/2/75 at 9:00 A.M.
July 2	Pre-trial conference held in the above case. Case ready for trial. Stipulations are to be prepared by attys. Trial to follow U.S. vs. Dominic Fago, which is scheduled for September 23 1975.
Oct. 9	Pre-trial conference held in above case. Ready for trial
1976	
Jan. 29	Pre-trial conference held. Court to hold hearing on whether statements of this deft. and other defts. were voluntary.
Feb. 26	Pre-trial conference. Adj. 3/4/76
Mar. 10	Filed subpoena (D.T. Robert Rohde, served - 3/8/76; Crucian S. Messina, served 3/9/76
March 11	Filed 4 subpoenas(DT) David Woodruff, Robert Clark, Erie Federal Savings & Loan Assn., and Anthony Glieco - served 3-9-76.
	Filed 3 subpoenas (DT) Doandl Roll, Raymond Stevenson and Condon, Klocke, & Gervase Attys at Law - served 3-10-76
March 12	Filed subpoena for Erie County Savings Bank - served 3-10-76
Mar. 12	Pre-trial scheduled but not held. Atty. Robert Murphy is in Texas. Adj. 3/17/76 for pre-trial. Jury selection 3/23/76 (Deft's requ

(See Sheet # 2)

Joseph J Gay
CRIMINAL DOCKET

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Docket Entries.

Sheet # 2
Cr-74-143

DATE 1976	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
Mar 15	Filed two subpoenas (D.T.) - United States Steel Corporation, served 3/10/76; Frank Mazurowski, served 3/11/76		
Mar. 16	Filed seven subpoena (D.T.) - Prudential Ins. Co. of America, served 3/10/76; Registrat and Transfer Co., Representative First National Bank of Jersey City, served 3/11/76; Henry J. Bokman, President Hank Bokman Oldsmobile, Inc. , Gulf Ins. Group, Susan Wetzel, served 3/12/76 ; Gertrude Wisniewski, served 3/15/76		
Mar 16	Filed two subpoena (D.T.) - Phillips Petroleum Co., served 3/11/76; Republic National Bank of Dallas, served 3/10/76		
Mar. 17	Pre-trial conference held in the above case.		
Mar 22	Filed 14 Subpoenas (D.T.) - General Motors Corporation, served 3/11/76; Irving Trust Co., Chase Manhattan Bank National Association, Bethlehem Steel Corporation, Chase Manhattan Bank National Association, Santa Fe Industries, Manufacturer's Hanover Trust Co., served 3/12/76; American Telephone & Telegraph Co., Morgan Guaranty Trust Co., Bank of N.Y. as agent for Dreyfus Investment Program , Shields & Co , Representative, First National Bank of Chicago, served 3/15/76; Bankers Trust Co., Bankers Trust Co. of N.Y., ret unserved; and one subpoena - Leonard Gay, ret. no-service		
Mar. 23	Filed Subpoena - Leonard Gay, served - 3/17/76; and one subpoena (D.T.) - Alphons I. Wozniak, served 3/17/76		
Mar. 23	Government moves case ready for trial, before Judge Curtin, at Bflo., N.Y / whereupon the jury is duly impanelled; Trial adj. to 3/25/76		
Mar 25	Trial continues from 3/22/76 with the same appearances and jury. Trial is adj. until tomorrow.		
Mar. 26	Trial continues from yesterday with the same appearances & jury Trial is adj. until 3/30/76		
Mar. 29	Filed three subpoenas (D.T.) - U.S. Borax - John Hancock Mutual Life Ins. Co., served 3/15/76; Marine Midland Municipals served 3/24/76		
Mar. 30	Trial resumes from 3/26/76 with the same appearances & jury. Trial is adj. until tomorrow morning at 9:30 a.m.		
Mar. 31	Trial continues from yesterday with the same appearances and jury. Certain stipulations read into the record in the presence of the jury. Trial is adj. until 4/6/76 at 9:30 a.m.		
April 6	Filed three subpoenas - Al Romenow, John De Matteo, Tom Pres served 3-31-76.		
April 6	Filed stipulation - re statement of facts - Richard E. Pelland, Jr.		
April 6	Filed stipulation - re statement of facts. a representative of Hank Bokman Oldsmobile, Inc.		
April 6	Filed stipulation of facts - Norman Seaner, Corporate Secretary of Erie Federal Savings & Loan Association		

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CR 76-143

Docket Entries.

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
1976			
April 6	Filed statement of facts - Treasury Dept. Bureau of Public Dept.		
April 9	Filed Govt's memorandum Of Law		
Apr 6	Trial continues from 3/31/76 with the same appearances & jury. Deft. moves to dismiss the Indictment. Motion denied. Trial is Adj. until tomorrow morning		
Apr. 7	Trial continues from yesterday with same appearances & jury. Trial is adj. until tomorrow morning at9:30 a.m.		
Apr. 8	Trial continues from yesterday with same appearances & jury. Deft. rests. Deft. renews motions made at the end of the Govt's Case. Decision reserved; Trial is adj. 4/12/76 at 2:00 P.M.		
Apr. 12	Trial continues from 4/7/76. Attorneys sum up - Trial adj. until tomorrow --		
Apr. 13	Trial continues from yesterday with the same appearances -- and jury-- the jury retires to deliberate upon their verdict. The jury returns with the following verdict: Defendant is guilty on all five counts of the indictment. Sentence is deferred 5/17/76		
Apr. 19	Filed deft's motionsto set aside the verdict of guilty ret. 4-20-76		
Apr. 20	Motion by deft to set aside jury verdict and for judgment of acquittal, and for a new trial based on Rules 29 and 33 of the Federal Rules of Criminal Procedure. Court extend time to argue motions to such time as transcript is prepared, briefs filed by the deft and the Govt. Exact time to be fixed upon preparation of the transcript.		
May 17	For sentence. Adj. until after filing of transcript of motion to dismiss the Indictment.		
June 25	Filed Ct. Steno's transcript of trial (3 volumes) held before Judge Curtin ~~before a~~ jury - taken on 3/22/76; 3/31/76 and 4/12/76		
July 1	Filed Order that the transcript having been filed on 6/25/76, the defendant may have until 7/19/76 to file brief in support of pending motions. Oral argument set for 7/28/76 at 9:2.m. Curtin, J.		
July 16	Meeting with counsel. Defts brief to be filed by 8-9-76. Oral argument on 8-13-76.		
Aug. 6	Filed Deft's notice of motion for an extension of time in which to file briefs on defendant's motion for judgment of acquittal or fe a new trial from 8/9/76 to 8/30/76.		
Aug. 6	Motion by deft. for extesnion of time for filing brief re motion for a new trial. Motion granted. Adj. to 9/3/76 for filing of deft's brief. Govt. to reply by 9/17/76.		
Aug. 9	Deft. brief due. Adj. to 9/3/76 at request of deft. Govt. to reply by 9/17/76.		
Sept. 3	Filed Memorandum in support of deft's motion for judgment of acquittal,et		

Sheet # 3

.S. v. Joseph J. Gay
CRIMINAL DOCKET

Docket Entries.

CR-74-143

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
1976			
Sept. 23	Filed Government's memorandum in Opposition to deft's motion for Judgment of acquittal or in the alternative for a new trial		
Oct. 5	Meeting held with the Court. Deft. to file brief Nov. 2, 1976 and Government to file reply brief Nov. 16, 1976.		
Nov. 2	Filed letter dated 11/1/76 to Judge Curtin, from R. William Stephens, re extension of time for the filing of the brief 2 of the deft. regarding the facts in the case - from 11/76 to 11/9/76; and extending the time of the Govt's brief from 11/16/76 to 11/23/76		
Nov. 9	Deft's brief due. Brief not filed.		
Dec. 16	Filed Deft's additional memorandum in support of defendant s motion for judgment of acquittal or in the alternative, for a new trial		
Dec. 16	Filed letter from Deft. Joseph J. Gay to the Court dated 12/16/76 - informing the Court that he agrees to any delay and further postponement of his sentencing as may be necessitated by these motions and waive any rights to claim otherwise, etc.		
1977			
Jan. 24	Government brief was due 1/16/77. Recent storm impeded efforts to file brief. Govt. informs Court it will be filed by January 31, 1977. Court finds there are extraodinary conditions which allow the the extra time.		
Feb. 9	Filed Government's supplemental memorandum in opposition to Defendant's motion for Judgment of Acquittal		
Feb. 11	Filed letter dated 2/10/77 from AUSA Richard Mellenger to Judge Curtin, explaining the reason why the Govt's suppl. memorandum in opposition to the defendant's motion for judgment of acquittal was filed on 2/9/77, instead of 1/31/77, etc.		
5/5/77	Filed Order, the defendant's motions must fail and are denied. CURTIN, J. (on 4/19/76 defense filed motions for judgment of acquittal and for a new trial pursuant to Rules 29 and 33 of the FRCP.) Sentencing is set for June 13, 1977.		
May 27	Filed ltr to Court fr Eugene L. Beltrami, M.D., deft's wife's physician, regarding her condition and requesting her illness be considered during sentencing deliberation.		
June 13, 1977	For sentence. Pre-sentence rept. not completed. Adj. to July 11. No appearance for deft.		
7/11/77	For sentence. No appearance for deft. Adj. to 7/21/77.		
7/21/77	Deft. is sentenced as follows: Deft. is placed on probation for a period of 3 yrs. On Count 1 deft. is fined $5,000.00. On Count 2 deft. is fined $7,500.00. On Count 3 deft. is fined $7,500.00. On Count 4 deft. is fined $7,500.00. On Count 5 deft. is fined $7,500.00. Total amount of fine is $35,000.00. A condition of probation is that the fine be paid within 30 days.		

U. S. GOVERNMENT PRINTING OFFICE

Docket Entries.

7—1594

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
1977			
	Bail on appeal is fixed in the amount of $35,000.00 cash or surety bond. Appearances: Robert Murphy, Esq. for the deft. AUSA Mellenger for the Govt.		

CLOSED

Indictment.

In the District Court of the United States

For the Western District of New York

THE UNITED STATES OF AMERICA

-vs-

JOSEPH J. GAY

NOVEMBER 1973 SESSION

No. CR-74- 148

Vio. Title 26, U.S.C., §7201

COUNT I

The Grand Jury Charges:

That on or before the 15th day of April, 1968, in the Western District of New York, JOSEPH J. GAY, a resident of Buffalo, New York who during the calendar year 1967 was married, did wilfully and knowingly attempt to evade and defeat a large part of income tax due and owing by him and his wife to the United States of America for the calendar year 1967 by preparing and causing to be prepared, by signing and causing to be signed, by mailing and causing to be mailed in the Western District of New York a false and fraudulent income tax return on behalf of himself and his said wife which was filed with the Internal Revenue Service wherein it was stated that their taxable income for the said calendar year was the sum of $13,218.62 and that the amount of tax due and owing thereon was the sum of $2,564.66, whereas, as he then and there well knew their joint taxable income for the said calendar year was the sum of $32,869.62 upon which said taxable income there was owing to the United States of America income tax of $9,025.24. In violation of §7201, Internal Revenue Code; Title 26, U.S.C., §7201.

COUNT II

The Grand Jury further charges:

That on or before the 15th day of April, 1969, in the Western District of New York, JOSEPH J. GAY, a resident of Buffalo, New York who during the calendar year 1968 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1968 by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed in the Western District of New York, a false and fraudulent income tax return on behalf of himself and his said wife which was filed with the Internal Revenue Service wherein it was stated that their taxable income for the said calendar year was the sum of $12,167.98 and that the amount of tax due and owing thereon was the sum of $2,474.65,whereas, as he then and there well knew their joint taxable income for the said calendar year was the sum of $30,562.11 upon which said taxable income there was owing to the United States of America an income tax of $8,706.66. In violation of §7201, Internal Revenue Code; Title 26, U.S.C., §7201.

COUNT III

The Grand Jury further charges:

That on or before the 15th day of April, 1970, in the Western District of New York, JOSEPH J. GAY, a resident of Buffalo, New York who during the calendar year 1969 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1969 by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed in the Western District of New York, a false and fraudulent income tax return on behalf of himself and his said wife, which was filed with the Internal Revenue Service wherein it was stated that their taxable income for the said calendar year was the sum of $13,433.93 and that the amount of tax due and owing thereon was the sum of $2,930.03, whereas, as he then and there well knew their joint taxable income for the said calendar year was the sum of $63,648.79 upon which said taxable income there was owing to the United States of America an income tax of $26,587.96. In violation of §7201, Internal Revenue Code; Title 26, U.S.C., §7201.

COUNT IV

The Grand Jury further charges:

That on or before the 15th day of April, 1971, in the Western District of New York, JOSEPH J. GAY, a resident of Buffalo, New York who during the calendar year 1970 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1970 by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed in the Western District of New York, a false and fraudulent income tax return on behalf of himself and his said wife which was filed with the Internal Revenue Service wherein it was stated that their taxable income for the said calendar year was the sum of $16,537.46 and that the amount of tax due and owing thereon was the sum of $3,495.75, whereas, as he then and there well knew their joint taxable income for the said calendar year was the sum of $62,429.21, upon which said taxable income there was owing to the United States of America an income tax of $24,161.92. In violation of §7201, Internal Revenue Code; Title 26, U.S.C., §7201.

COUNT V

The Grand Jury further charges:

That on or before the 15th day of April, 1972, in the Western District of New York, JOSEPH J. GAY, a resident of Buffalo, New York who during the calendar year 1971 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and wife to the United States of America for the calendar year 1971, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed in the Western District of New York, a false and fraudulent income tax return on behalf of himself and his said wife which was filed with the Internal Revenue Service wherein it was stated that their taxable income for the said calendar year was the sum of $19,282.58 and that the amount of tax due and owing thereon was the sum of $4,179.12, whereas, as he then and there well knew their joint taxable income for the said calendar year was the sum of $55,199.98 upon which said taxable income there was owing to the United States of America an income tax of $19,755.99. In violation of §7201, Internal Revenue Code; Title 26, U.S.C., §7201.

JOHN T. ELFVIN
United States Attorney

A TRUE BILL:

Foreman

Decision and Order Dated March 7, 1975.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff

v. CR-74-143

JOSEPH J. GAY.,

Defendant

APPEARANCES: RICHARD J. ARCARA, ESQ., United States Attorney (RICHARD E. MELLENGER, ESQ., of Counsel), Buffalo, New York, for the Government.

ROBERT M. MURPHY, ESQ., Buffalo, New York, for the Defendant.

On December 30 and 31, 1974, the court held a hearing on defendant's motion to suppress certain statements made by the defendant to revenue agents. The court gave permission to counsel to file briefs addressed to the facts and the law. The Government has filed a brief but the defendant has not. The following constitutes the court's findings of fact and conclusions of law.

The defendant has been indicted in a five-count indictment charging tax evasion for the years 1967 to 1971 inclusive. Testimony at the hearing revealed that the taxpayer was first contacted on December 28, 1971, by revenue agents. The agents explained who they were and that they were conducting a criminal investigation of his tax returns and told him the investigation covered the years 1968 through 1970. He was interviewed again on January 6, 1972, June 8, 1972, February 21, 1973, and May 8, 1973. A detailed warning according to the Internal Revenue format was only given to him on the occasion of the first interview. On February 21, 1973, he was informed for the first time that the investigation also included the years 1966, 1967 and 1971. At the last two interviews the defendant was accompanied by an accountant who had also assisted him in the preparation of his tax. Before the December 28th interview at his home the agents had contacted the defendant at a restaurant where the defendant was at the bar. They told him who they were at that time and he left, driving his own car, and proceeded to his home where the interview was conducted. The defendant was never in custody; therefore, Miranda warnings were not required and, furthermore, the agents followed the appropriate Internal Revenue Service Regulations in conducting the interviews. The motion of the defendant to suppress is denied.

So ordered.

John T. Curtin

JOHN T. CURTIN
United States District Judge

DATED: March 7, 1975

Transcript of Proceedings, March 22, 1976.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

* *

THE UNITED STATES

-v-

JOSEPH V. GAY,

Defendant.

CRIMINAL DOCKET
NO. 1974-143

* *

Proceedings of trial held before the HON. JOHN T. CURTIN, and a Jury, in Part I, United States Court House, Buffalo, New York, commencing on March 22, 1976.

APPEARANCES:

RICHARD J. ARCARA, United States Attorney
by RICHARD MELLENGER, Assistant United
States Attorney.

ROBERT M. MURPHY, Esq., Attorney for
the Defendant.

* * * * * *

PROCEEDINGS: March 22, 1976, 11:20 a.m.

APPEARANCES: As before noted.

(Defendant present.)

THE COURT: Mr. Murphy and Mr. Mellenger, you are ready?

MR. MELLENGER: Yes, your Honor, we are ready.

THE COURT: Mr. Murphy?

MR. MURPHY: Ready, your Honor.

THE COURT: Ladies and gentlemen, we are here this morning to select a jury in the case of the United States against Joseph Gay, Criminal No. 1974-143. The trial of this case will begin in a few days. We are going to select a jury in another case this afternoon at 2:30 so if you are excused this morning, come back this afternoon and we will select a jury in this other case, the Campana case, which is a short case and will go on first, beginning tomorrow. This case, Mr. Mellenger, you believe will take about how long?

MR. MELLENGER: I believe about one week, your Honor.

THE COURT: It would appear that perhaps we may

2 get going on this case later this week, or at least early next week and that means that it would certainly go into next week. We expect we would finish next week. We may not, and if we do not, then we would take it up the week of April 5th and certainly it would finish sometime at that time so that is the outside time of service in this particular trial, sometime during the week of April 5th and we do expect we would finish sooner, As I understand it, this is the first day of appearance, is that right, Mr. White?

THE CLERK OF THE COURT: No, Judge. They were here Tuesday when we picked a grand jury.

THE COURT: Perhaps this was explained to you before but in our District here in Buffalo, there are only two Judges, myself and Judge Elfvin, so that we do not pick juries every day. The cases we have take anywhere from two or three days to try, to sometimes two or three weeks and the cases that we have on the calendar today are both rather short and will not take a long time to try. If you are not picked for either one of these cases, then you can go home and go about your business and in a week or so, when either Judge Elfvin or myself have other cases to be tried, you will be notified to come in and you are in the pool and we will select a jury in another case.

The first step in the procedure, Mr. White will have 12 jurors picked at random who will get in the box and I will ask you questions. This is a tax case so that we will ask you questions and tell you who the witnesses appear to be and tell you something about the participants, the lawyers, the defendant. We will ask you some questions not to pry into your personal affairs but so the lawyers can determine whether or not you should be jurors serving in this case.

The Government has six peremptory challenges and the defendant has ten. That means they simply can excuse you without giving any reason at all. Sometimes there are challenges for cause, but only under special rules.

To begin, Mr. White, why don't you select twelve individuals to go in the box, please.

(A jury of twelve was duly examined, impaneled and sworn.)

THE COURT: Mr. White, we will select two alternate jurors. Have two jurors put in the box.

(Two alternate jurors duly examined, impaneled and sworn.)

THE COURT: Mr. Murphy and Mr. Mellenger, can you come up, please.

(Off the record sidebar conference held between Court and Counsel.)

THE COURT: Ladies and gentlemen, go with the Marshal and go downstairs to the jury room. Mr. White will go down with you and he will give you an instruction sheet. The

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sheet has a telephone number on it. We have a system here where you can call in. You may have this sheet before, but at any rate, Mr. White will go with you to make sure you understand the procedure. We are going to start a trial, pick a jury in another case. We are going to start that trial. That is a relatively short trial. We are going to ask you to call in this Wednesday evening, anytime after 5:00 o'clock on Wednesday. At that time there will be a recording on the telephone. It will give you instructions about when to report. It might tell you to report Thursday morning. It might tell you to report Friday morning or it might tell you to please call back again at a particular time. At any rate, you are free to go about your business the rest of today, tomorrow and Wednesday, but be sure to call anytime after 5:00 o'clock on Wednesday and the recording will be on the machine and it will be on there if you want to call at 3:00 in the morning, you can call at 3:00 in the

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morning, but you will get further instructions.

In the meantime it is important that you do not talk about the case in any way. You certainly can go and make your own income tax return and talk to the preparer of it, but you should not do any special reading up on income tax law or problems. You should wait until you come back into court here at our next session and at that time you will hear about this case and we will reach the issues in this case upon what we hear in the court, not anywhere else, so please go with the Marshal and he will show you where the jury room is and when you report at the appointed time, whatever it is, please go directly to the jury room on the fifth floor and then we will have you up here and start the trial.

The other jurors are now excused until 2:30, those of you beyond the rail, and come back and we will select another jury.

We will be in recess.

(Recess taken at 12:16 p.m.)

* *

PROCEEDINGS: March 25, 1976, 10:55 a.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury present.)

THE COURT: Ladies and gentlemen, in this case, for various reasons, which are good reasons, this morning we will hear the opening statements of the attorneys in this case and then we will be in recess until tomorrow morning when we will start the testimony.

At this time we will hear the opening statements made first by Mr. Mellenger and then, if he desires, by Mr. Murphy. The Government will make an opening statement. The defense counsel, Mr. Murphy, is not obliged to. He may, if he desires. You will certainly keep in mind that whatever the lawyers say should be listened to carefully so that you may listen better to the evidence as it comes in in this case, but what the attorneys say in and of itself, is not evidence.

Mr. Mellenger.

MR. MELLENGER: Thank you, Judge Curtin. Mr. Murphy, ladies and gentlemen of the jury:

As you know by this time, I am Assistant U.S. Attorney Richard E. Mellenger, and it is my duty to try the Government's case against the defendant, Joseph J. Gay, who you see seated at the defense table at this time. As Judge Curtin says, what I say during the course of this opening statement and during the course of this trial, is not evidence. Likewise, what Mr. Murphy may say during the course of this trial is not evidence.

During the course of the trial there will be three types of evidence for your deliberations. First will be the testimony of witnesses who are subpoenaed and sworn in to testify in front of you.

The second type of evidence will be exhibits, tangible things which the Court says is evidence for your deliberations. In this case there will be a lot of documents.

The third type of evidence are stipulations. These are things which the defense and the Government have gotten together about before the trial of this action and have agreed that these matters are not in issue and have agreed that it is not necessary to take your time in bringing in witnesses or exhibits in order to establish them. It is basically an agreement between the defendant and the Government.

The purpose of this opening statement is to give you an overview of this case to let you know where we are going, a roadmap. If you have ever worked a jigsaw puzzle, you know you take all the pieces and you just dump them on the table and you have a picture on the box. You start fitting them together and you look at the picture on the box. Well, this opening statement is that picture on the box which lets you know where we are going and lets you fit in the bits and pieces of evidence as they are admitted.

As you have heard, this is an income tax case. More specifically an income tax evasion case which admittedly is not the most popular type of case at this time of the year. At this point, I would like to review the indictment with you.

The indictment charges the defendant, Joseph J. Gay with five counts for the calendar years, 1967, 1968, 1969, 1970 and 1971 and charges that in each of those years he was married and he did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by he and his wife and that he did this by filing in the Western District of New York a false and fraudulent income tax return on behalf of himself and his wife.

Now, the amounts we will be dealing with will be income which has not been reported on his tax return for those calendar years. For '67 it will be approximately $19,000 not reported, and tax due and owing approximately six thousand. '68 unreported income, eighteen thousand, the tax in excess of six thousand. In

1969 there was quite a jump. The unreported income is in excess of $50,000. The tax on that, $23,000. 1970, another good year, $45,000 of unreported income. The tax, twenty thousand, and finally in 1971, $35,000 unreported income with a tax of fifteen thousand.

Over the five year period, the defendant had unreported income in the area of $170,000; tax in excess of $70,000.

Basically in proving its case beyond a reasonable doubt, the Government must prove three essential elements. The first, there is an additional tax due and owing and the Government has to prove that that tax is a substantial amount.

The second element is there was an attempt to evade or defeat the income taxes.

The third essential element is willfullness. We are not trying to convict anybody for an innocent mistake or doing something unintentionally. The defendant had to willfully attempt to evade or defeat income taxes.

This case, in theory, is basically a simple case, in theory, and the theory has a name. It is called the expenditures theory and it is very simple. The defendant reported this much income on his tax return. He could explain cash from non-taxable sources and he spent in excess of what was reported in his return and what could be explained by non-taxable sources. The difference is taxable income.

Although the theory is simple, the actual proof is not and at this point the Government anticipates calling approximately twenty witnesses. Most of these are what is known as foundation witnesses to introduce exhibits. There will be bankers, stock brokers, insurance agents, people who will introduce bank statements and stock certificates and things like that. We are also going to have some testimony about the defendant's investment in real estate mortgages and some other witnesses will testify about miscellaneous financial transactions with the defendant.

We are also going to have the testimony of special agents of the Internal Revenue Service and they will testify as to conducting the investigation, meeting with the defendant, receiving various books and records from the defendant, conversations which they had with him and you are going to learn a little bit about the defendant's background. He has got a printing business which he operates from the basement of his home. He is a modest liver and lives on the east side of Buffalo, owns his own home, free and clear. There is no mortgage on it and he is not a high liver and he is not going to Las Vegas or the Riviera or anything of that nature, but you are also going to learn that he is a very astute investor.

He has got holdings and mortgages, stocks, bonds, certificates of deposit, extensive bank accounts, even some real estate. He spreads his investments around, doesn't keep all his eggs in one basket, so to speak, and basically the income which he receives on these investments has been reported on the returns. Through the testimony of the special agents you will see where a dividend went unreported or an interest payment which he received went unreported and they asked him about these and he said, "Well, I forgot it. My accountant missed it", or something like that, and the Government's theory of proof takes these statements at their face value. We are not going to charge him with the missed dividend here or the missed interest payment there, nickles and dimes. We are not going to sweat the small stuff. As you have heard, the tax is substantial so when the defendant said he missed something, we took his word for it.

We are going to have a Special Agent John Quinn who is going to come in here and he is going to tell you of a cash analysis which he performed on the defendant's records. This is kind of a cash flow or a source and application of

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funds. What he does is, he looks at what the defendant has spent and tries to isolate where these funds are coming from and to some extent he does isolate a lot of these funds. He can see where perhaps monies are withdrawn from a savings account and used to purchase a security of some sort or monies received as income from the printing business are used for some sort of expenditure but you will also see a lot of unexplained cash coming to the defendant's possession, cash which no source can be found for and you will hear Special Agent Quinn tell you that he tried to locate some sources. He tried to find bank accounts around the Western New York area or possibly other security holdings and he couldn't locate them. He could not locate the sources of these unexplained funds.

You will also hear special agents testify about asking the defendant about what is known as a cash horde. That is, money which is not deposited in the bank or tied up in some traceable security or

Opening Statement by Mr. Mellenger.

something, possibly money kept in a safe deposit box or buried in a strong box in the back yard and they will tell you that the defendant told them the most cash he ever had would be $2,000 and as the course of the investigation went on the defendant remembered some more cash which he found, an additional $11,000 which his wife found in a mattress at home, I have forgotten, something like that.

Well, the Government gives him credit for this $2,000 on hand and $11,000 found in the mattress. Even with these explanations there is still a lot of unexplained cash coming in to the defendant's possessio during the indictment years, approximately $100,000 of unexplained cash.

Now, as this proof is coming in it is going to be confusing. It is going to be admittedly somewhat boring. There is no logical flow, using the jigsaw puzzle analogy, just bring all the proof in and dump it in and then near the end of the trial, witnesses will start putting this proof together, start assembling it.

At first you are going to get a bank statement here, a stock certificate there, a certificate of deposit here and testimony about sale of a stock or money spent for a municipal bond here and you will have all these figures and documents floating around and you are probably sitting there saying, "Well, I am not a financial analysist or a tax expert or account, how am I going to put these figures and documents together". Well, we have somebody who is going to help you do that. You see seated over there in the courtroom is a gentleman. His name is Joseph Russo, a Revenue Agent, and he is going to be called on to testify and he will tell you that he has been a Revenue Agent for twenty-six years, he studied accounting at Bryant and Stratton and also at Canisius and he is going to be sitting here during the course of the trial evaluating this evidence and then at the end he is going to come in and testify and he's going to tell you about various analysis that he has performed on these documents and figures as they are presented in evidence, various computations he has made and conclusions from all of this and he will have schedules to help you tie all this together. He is going to show you where figures come from and trace them back to the source document, the Government Exhibit which a certain figure will come from.

This can be a very confusing case but if you just remember the basic theory of the case and fit all this in that perspective you should have no problem understanding this evidence. So much is reported on the returns as taxable income and so much can be explained from non-taxable sources. The defendant spent in excess of those amounts and that is taxable income and don't let yourself get muddled in all the documents and all the figures so you can't see the forest for the trees, so to speak. You have to kind of keep at a distance and view the evidence as it is coming in and keep it in view of that theory and don't let the pennies and dollars mix you all up or muddle you down or hold you down. These are going in to prove one element and that is that there was a substantial amount of income tax due and owing.

At this point the Government just asks you to pay attention to the evidence as it comes in, especially when the revenue agents start testifying. These are substantial witnesses in the case and if you pay attention and keep an open mind, that is all the Government is asking at this point, both on behalf of the Government and the defense, we want a fair trial. That is all that is asked and when you hear all the evidence and consider all the evidence, you will find that the Government has proved the charges against the defendant, Joseph J. Gay, beyond a reasonable doubt.

Thank you.

THE COURT: Mr. Murphy.

MR. MURPHY: May it please the Court, Mr. Mellenger, members of the IRS, ladies and gentlemen of the jury:

As Judge Curtin has indicated to you, it is not necessary for me to make an opening statement in this case, but as I sat there and listened to the Government indicate the form of proof that they are going to bring into this courtroom, I decided that it is necessary for me to make an opening statement in this case.

Now, you can appreciate, I am sure, that I, like you, will hear the crux of the Government's case during the next few days as witnesses are being brought in, but aside from knowing their case, until it is presented in this courtroom, it is my duty and I perform that duty, I believe, to my client, to this Court and to you ladies and gentlemen, to investigate fully the circumstances surrounding this case.

Now, that investigation which I have made, has shown to me and it is my belief that the proof will show you that Joseph Gay, as indicated by Mr. Mellenger, is not a high liver, never has been a high liver. We will prove to you, ladies and gentlemen, that Joseph Gay, at the age of thirteen years, left school after completing eighth grade, or eight years of education, a graduate of the eighth grade. That is somewhere back in the late twenties. Immediately upon his leaving school, he got into and was working as sort of a cleanup boy apprentice in a printing shop. Mr. Gay then in the early thirties, after learning the printing business, himself bought a printing press and went into business for himself.

Up until the late thirties he worked as a printer in his own business. He then, during the war, or prior to the war, received and went into business in the saloon business. His mother-in-law helped him acquire this business. He ran this business until the war started, at which time he sold the business. Now, this is in the forties, for a substantial amount of money.

He then went to work for the Chevrolet Plant during the course of the war; left

Opening Statement by Mr. Murphy.

there and went to work for Bell Aircraft in defense work, all the time running a printing business on the side. That continued up to the late forties when he went to work on the railroad, again printing business on the side, always.

Then up until the sixties, at which time he was he was an investor, - or, I am sorry, - following the railroad, he became a liquor salesman and then came into the sixties when he gave up that occupation and became an investor up until the year 1970 when he went to work for his son-in-law in South Park Electric as the treasurer of that corporation at which he makes a substantial salary.

Now, the preparation of his tax returns has always been done by an accountant. He and his wife gave the figures to the accountant. The accountant went over to him and you will see that in the year 1971, one of the years in question, because of the failing health of his previous tax man, a new tax man took over, an individual named Fred Willis, who himself was a former IRS Agent in audit and intelligence, intelligence being that portion of the IRS that deals with fraud and criminal investigations.

Now, upon being notified by the Federal Government that his taxes were in question, you will see that Mr. Gay cooperated with the Federal Government fully, fully to an extent, one extent, with the one exception, and that is the Federal Government's agents questioning with regard to tax, - or I am sorry, - monies on hand. You will hear the circumstances under which this question was asked, where the question was asked and then decide, and Mr. Gay will tell you what his answer was and why his answer was at that particular time because, ladies and gentlemen, we will prove to you that it is totally unrealistic for the Government to say unidentified source or unrecorded income because the figures that were given to you by Mr. Mellenger with respect to the fifteen thousand, the nineteen thousand, the fifty thousand, the thirty-five thousand and the $40,000 are not income and never were income.

We will prove to you, ladies and gentlemen, that in the year, - in the late fifties, in the late fifties, Mr. Gay handed out private mortgages to individuals in the sum of some $69,000 in cash, cash; private mortgages that he has given to his friends were cash transactions. He gave cash. Now, there is no way other than an accumulation of cash or a horde of cash that this could have been done because there can be and we will show there were no bank accounts, no savings accounts to pull this out of. Now, these are individuals who he gave mortgages to over the years, became a source of income. These people will testify as to these transactions, $10,000 mortgages, $15,000 mortgages, $13,000 mortgages. We will be able to show to you through Mr. Gay's family, how much cash he gave to his daughters; how much cash he gave to his brother; how much cash he gave to the various friends who were unable to acquire other mortgages; the selling of homes; selling of lots Mr. Gay, as Mr. Mellenger indicated, was a routine investor. The source of funds from his father, his father's estate. That will come in. We will see what the IRS's attitude was with respect to that.

Now, I heard a rather strange statement from the United States Attorney during the course of his opening, when he asked you, "Don't get bottled down by these figures". Well, I submit, ladies and gentlemen, that this is very important. The burden of proof beyond a reasonable doubt rests with the Government, not with Mr. Gay and they come in and they say to you, "Well, we are going to prove all this through figures but don't you worry about it, don't get bottled down with it, don't pay too much attention to it because we have an expert who is going to come on the stand at the end of the case and figure it out for you".

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to come. I told you what I expect the proof will reveal but I don't purport at this time to insult your intelligence by saying, "Now, when all this is finished find him not guilty". You can't make any decision right now. Our two opening statements were designed to give you an insight. I'm not going to tell you or ask you when it is all finished, that he is going to be found not guilty. I will have an opportunity to address you again at the close of the case when all of the proof is in, to set forth arguments why I believe that the Government has failed to prove their case.

Ladies and gentlemen, I ask you also for your kind attention during the course of this trial but I urge you, don't pay particular attention to any one witness as opposed to another. That is not how the game is played. In order to fair and duly try this case, which you took an oath to do, you have got to pay particular attention to every witness and I ask you please pay particular attention to every witness, both Government and defense. It is then, and only then, that you will be able to fulfill that oath and fairly and truthfully reach a decision in this case.

Thank you.

THE COURT: Ladies and gentlemen, at this time we will be in recess until tomorrow morning. During the trial, during the breaks, whether they are short or long, do not talk about the case. Do not talk about it among yourselves, your fellow jurors and certainly do not talk about it with others, your friends, relatives, neighbors and so forth. Keep your minds open, listen to the evidence, do not make up your mind about anything until you have heard all the testimony, until you have heard the summations and the charge.

At this time you will be in recess for the day and come back tomorrow at 10:00 a.m. and begin the proof in the case at that time. 10:00 o'clock tomorrow. You may go out with the Marshal.

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(Jury escorted from the courtroom.)

THE COURT: We will be in recess.

(Recess taken at 11:22 a.m.)

* * * * * * * * * * * *

PROCEEDINGS: March 26, 1976, 10:20 a.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury present.)

(Government Exhibits Numbered 1 through 149, inclusive and respectively, marked for identification.)

(Court Exhibits Numbered 1 through 32, inclusive and respectively, marked for identification.)

THE COURT: All right. We are ready, Mr. Mellenger. When you are ready, call your first witness, please.

MR. MELLENGER: Yes, your Honor. The Government calls Kenneth Krysztof.

KENNETH M. KRYSZTOF (1180 Losson Road, Cheektowaga, New York), a witness called by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MELLENGER:

Q Mr. Krysztof, where are you employed?

A Internal Revenue Service, Intelligence Division.

Q And what is your position there?

A Special Agent.

Q Would you briefly describe your duties to the jury?

A One of the functions of a special agent is to investigate the possible criminal violations of the internal revenue laws.

Q And how long have you had this position?

A Approximately ten years.

Q As a special agent, did you ever have occasion to investigate a Joseph J. Gay?

A Yes, I did.

Q Have you ever met Mr. Gay?

A Yes, I have.

Q And approximately on how many occasions?

A Five times.

Q Do you see him present in the courtroom?

A Yes, I do.

Q Would you point him out and describe him, please?

A Sitting right there.

Q When was the first time you met Mr. Gay?

A On December 28, 1971

Q And where did this initial meeting take place?

A At the Park Lounge on Clinton Street.

Q And what, if anything, was said at that time?

A I introduced myself to Mr. Gay and told him I would like to speak to him and we went to his residence.

Q Okay, and how did you get there?

A I drove a Government vehicle.

Q And how did Mr. Gay get there?

A He drove his personal car.

Q And what happened when you reached his residence?

A He invited myself and Special Agent Warren Plant into the residence and we went to the basement and conducted the initial interview.

Q And what was said during this interview?

A I informed Mr. Gay of his rights. I showed him my credentials for his inspection and I told him the function of a special agent and he said he understood his rights and we proceeded with the interview.

Q Did you tell him you were conducting a criminal or a civil investigation?

A A criminal investigation.

Q And after you told him this, what did you say to him then?

A I showed him tax returns that I had and I asked him if he could identify these returns. The returns I showed him were the 1963 and 1965 through 1970 tax returns

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which he identified as his signature as being the returns which he filed.

THE COURT: Excuse me. What is the date of your meeting with Mr. Gay?

THE WITNESS: December 28, 1971

BY MR. MELLENGER:

Q Agent Krysztof, I'm showing you Government's Exhibits 1, 2, 3, 4, 5, 6, 7, marked for identification and I ask you to look at those, please. Do you recognize those?

A. Yes, I do.

Q And what are those?

A. Those are the tax returns that I showed Mr. Gay on that date.

Q And those are the same returns which he recognized?

A. Yes, they are.

Q Did you discuss the preparation of those returns at all?

A. Yes, I did.

Q And what, if anything, did you ask Mr. Gay about the preparation of those returns?

A. I asked him if he prepared those returns to which he replied a Mr. Francis Kuras, who is a registered public accountant, prepared all these returns.

Q Okay, and did you ask him anything else about those returns?

A. Yes. He replied that all income, that he reported all of his income on these returns. He further stated that his main source of income was from interest income, dividend income, Schedule C net profit from Gay's Printing, capital gains from stock transactions and he also stated he had some W 2 wages in 1970 where he was employed as a salesman for South Park Electric since March of 1970.

Q. You said that he had some Schedule C income from Gay's Printing. What do you mean by "Schedule C income"?

A. Schedule C income is a schedule that shows a net profit from doing business that is part of the personal income tax return.

Q. That would be self employment income?

A. Self employment income, yes.

Q. Did he say anything about prior employment prior to the return years?

A. Mr. Gay stated that he was a liquor salesman back in the late forties and early fifties.

Q. Did he say anything about any dependents?

A. Mr. Gay stated that he had two children, two daughters. However, they were both married approximately eight years already and that neither were his dependents during the years in question.

Q. Now, you stated that he stated that he reported all of his investment income. Did you ask him anything about investments?

A. Yes. I asked Mr. Gay what type of stocks or bonds he had to which he replied that he had a brokerage account with Loeb, Rhodes & Company, with Shields & Company. He had savings accounts with the Buffalo Savings Bank, Erie Federal Savings and Loan Association and Marine Midland Bank. He also said that his wife had a bank bond with Erie County Savings Bank.

Q. Did he say anything about mortgages at all?

A. Yes. He also stated that he had given mortgages to friends and relative.

Q. Did he say anything to you about investments in municipal bonds?

A. No, he did not.

Q. Did he say anything to you about U.S. Savings Bonds?

A. Yes. He stated that during the years in question, which were the years 1968, 1969 and 1970 that he has not purchased nor redeemed any U.S. Savings Bonds.

Q. Did you ask him anything about a checking account?

A. I asked Mr. Gay if he had a personal checking account to which he replied that neither he nor his wife have a personal checking account. However, he does maintain a business checking account under the name of Gay's Printing at Marine Midland Bank.

Q And did you ask him anything about a safe deposit box?

A Yes. Mr. Gay stated that he had a safe deposit box at Marine Midland. However, he stated that he only keeps miscellaneous papers in there and does not keep any cash.

Q Did you discuss trusts at all?

A Mr. Gay stated that he does not maintain any trust accounts in the name of anyone else.

Q Did you ask him whether he had any loans or outstanding debts?

A In that area, Mr. Gay stated that he does not have any loans, does not have any debts and that his house is free and clear.

Q And what, if anything, was said about non-income items such as gifts, inheritances, et cetera?

A I asked Mr. Gay if he had any income from sources that were not income and I explained that included insurance proceeds, inheritances, gifts, accident awards, to which he replied that he received approximately five to six thousand dollars as an inheritance from his parents which would have been in approximately 1968 or '69 and he also said that he received approximately $1,800 from accident proceeds and also in either '68 or '69. He further said he did not receive any other non-income sources, that he has also never given any gifts to anyone else.

Q At the time of this initial meeting with Mr. Gay, did you ask him to furnish you with any records?

A. I asked Mr. Gay to furnish me records relative to the mortgages that he made with his friends and relatives and Mr. Gay said that he would make these available to me as soon as he could and he would call me shortly after the first of the year.

Q And did he ever call you?

A. Mr. Gay called me on January 3, 1972 at my office and said the mortgage records that I had requested were available and that I could come to his residence on January 6th and pick them up.

Q And on January 6th, did you go to his residence?

A. Yes, I did.

Q Okay, and did you pick these records up?

A. Yes, I did.

Q What, if anything, did you do with these records after you received them from him?

A. I asked Mr. Gay who prepared these records. He said the records he was giving me, he personally prepared and that these records disclosed the name of the person that has the mortgage with him. It also showed the amount of the mortgage, the date and the amount of principal payment, the date and amount of the interest applied and also the computation of the outstanding balance. When I received these records I marked, - I took them back to the office and photocopied them.

Q Okay, and after you photocopied them, what did you do with the original records?

A. I compared the photocopies with the originals and then returned the original documents back to Mr. Gay.

Q I am showing you Government Exhibits 75, 76, 77, 78, 80,81, 82 and 84. Would you look at those, please. Do you recognize those?

A. Yes, I do.

Q And would you identify those?

A. These are photocopies of the mortgage records that Mr. Gay supplied to me.

Q And do the names of the persons to whom he made those mortgage loans appear on those records?

A. Yes, they do.

Q And who were those loans made to?

A. Government Exhibit 75 shows a loan made to a Mr. and Mrs. , - a mortgage made to a Mr. and Mrs. Bycina in the amount of $10,000. Exhibit 76 is a loan made to a Mr. and Mrs. Kaczmarek in the amount of $6,000.

THE COURT: Excuse me. What dates were these? Are there any dates?

THE WITNESS: Yes, your Honor.

BY MR. MELLENGER:

Q Mr. Krysztof, these mortgages, the records you obtained from Mr. Gay at that time were outstanding at the time you received the records from him, were they not?

A. Yes, they were. The first mortgage corresponding with Exhibit Number 75 in the amount of $10,000 shows a first payment due of July 6, 1960.

THE COURT: That was to whom?

THE WITNESS: Mr. and Mrs. Bycina.

THE COURT: On each occasion give the name, the amount and the date. Does it reflect when the loan was made?

THE WITNESS: Not specifically. It just shows date of first payment.

THE COURT: All right. Give us the date of the first payment.

THE WITNESS: Exhibits 76 is a mortgage record for a Mr. Kaczmarek in the amount of $6,000 with the first payment on August 6, 1963. Exhibit 77 shows a mortgage in the amount of $5,000 to Leonard and Nancy Kocol with the first payment on October 1, 1969. Exhibit 78 is a mortgage in the amount of $11,000 to Mr. and Mrs. Ted Mazur with the first payment on January 12, 1960. Exhibit 80 indicates a mortgage in the amount of $3,500 to a Mr. or Mrs. Tokarczyk with the first payment made on April 1, 1965. Exhibit 81 indicates a mortgage to Stanley Toporczyk in the amount of $6,000 with the first payment June 20, 1962. Exhibit 82 indicates a mortgage in the amount of $7,000 to Gertrude Wisniewski in the amount of $7,000 with the first payment made January 1, 1969. 84 is a mortgage to Frank and Elenore Mazurowski in the amount of $6,000 with the first payment on January 1, 1972.

BY MR. MELLENGER:

Q And you said you returned the originals to Mr. Gay?

A Yes, I did.

Q And what date was that?

A I believe it was January 11, 1972.

Q And did you conduct any interview with him at that time?

A I did ask him a question at that time as to how he paid his, - certain expenses such as real estate or other expenses of that nature since neither he nor his wife have a personal checking account and he replied that these payments such as that were made through his business checking account.

Q And did you have occasion to see the defendant after that?

A Yes, I did.

Q And when was that, approximately?

A I believe it was February 17th.

Q All right, and what transpired on that occasion?

A On February 17th, I believe I obtained his copies of his original cancelled check, bank statements and also a customer book for Gay's Printing.

Q And what did you do with these items?

A I took them back to the office after giving him a document receipt for these items. I put these on microfilm and when the microfilm was returned I reproduced these items, compared them to the originals and returned the originals to Mr. Gay.

Q Showing you Government's Exhibits 85, 86 and 87 marked for identification, I ask you to look at those, please. Do you recognize those?

A Yes, I do.

Q And what are those?

A Exhibit 85 is a microfilm reproduction of the cancelled checks that Mr. Gay supplied to me for Gay's Printing.

THE COURT: Does it show what years?

THE WITNESS: For the years '68, '69 and '67, a portion thereof. Exhibit 86 are microfilm reproductions of the checking account ledger sheets in the name of Gay Printing Company from Marine Midland Bank.

BY MR. MELLENGER:

Q And for what dates are those?

A The first sheet indicates a date of October 30, 1970. It is in reverse order. It is from 11-1-67 to January 27, 1971.

THE COURT: Those are what, bank statements?

THE WITNESS: Bank statements, and Exhibit 87 is a microfilm reproduction of the customer book for Gay Printing Company. This shows listings for the period, 1962 through 1972.

BY MR. MELLENGER:

Q Okay, and did you have occasion to return the originals of those items to Mr. Gay?

A I believe I did.

Q Okay. Do you remember offhand when that was?

A No, I do not.

Q Okay. Calling your attention to June of '72, did you have occasion to meet with Mr. Gay during that month?

A. Yes, I did.

Q. Do you remember what date that was?

A. I met with Mr. Gay again on June 8, 1[illegible] the Park Lounge with Special Agent Donald Bro[illegible]

Q. And what was the purpose of that meeting?

A. The purpose of that meeting was the case had been reassigned to Special Agent Brownell from me as of June 5, 1972. The purpose of the meeting was to introduce Special Agent Brownell to Mr. Gay which I did and I informed him that Mr. Donald Brownell would be handling the investigation from that point forward and that I would no longer be conducting this investigation.

Q. Did you have any occasion to interview Mr. Gay at all at that time?

A. We had a short interview at the Park Lounge, wherein Mr. Gay was asked if, - what his cash on hand was at that time and he replied that it would be approximately $2,000.

THE COURT: What date is this, Mr. Krysztof?

THE WITNESS: June 8, 1972.

BY MR. MELLENGER:

Q. What do you mean by cash on hand?

A. By cash on hand, we mean any money - -

Mr. Murphy: Your Honor, I object to that.

THE COURT: I sustain the objection. I think what we should have here is what was the conversation. The important thing is,what did he explain to Mr. Gay was meant by this term?

BY MR. MELLENGER:

Q Yes, your Honor. Did you explain to Mr. Gay at all what you meant by cash on hand?

A. Yes, I did. By cash on hand, I informed Mr. Gay that I meant any monies that were undeposited such as money he might have in his pocket, in his wallet, in his bureau drawer, in a cigar box, anything of this nature, including checks that were not yet negotiated and he replied that the most he could ever have at any one point in time would have been $2,000.

Q Did you ever ask him about cash on hand during any of your previous meetings?

A. Yes, I did. I asked him about cash on hand at the meeting on December 28, 1971.

Q What did he say at that time?

A. At that time he said that he would be unable or it would almost be impossible to realize how much cash he had on hand at any one point in time due to any mortgage receivables he might have received payment on, stock dividends he might have received, any payments from his business as Gay Printing and any withdrawals he might have made from any accounts at that time.

Q During the course, when you were handling this investigation, Agent Krysztof, did you ever try to summons any of Mr. Gay's records through financial institutions?

A Yes, I did.

Q Okay, any bank records?

A Yes, bank records and other financial institutions.

Q How about from Marine Midland Bank?

A Yes, I did.

Q And did you ever receive any records from Marine?

A Yes. I received records from Marine Midland and when received by mail they were accompanied by a transmittal letter.

Q Showing you Government's Exhibits 18-1, 22, 23 marked for identification, are those records which you received pertaining to Joseph Gay, from Marine Midland Bank?

A They may be, but I would not be certain just by looking at them.

Q Is there anything which would refresh your recollection?

A If these were forwarded to me by Marine Midland, they would have been accompanied by a transmittal letter from that bank.

Q I am showing you Government's Exhibit 26-1 and asking you to look at that. Would you identify that, please?

A. It is a letter dated March 6, 1972 from Marine Midland Bank Western, forwarded to my attention.

Q Okay, and I ask you to read that to yourself, please. Okay. Now, I am showing you Government's Exhibit 18-1 again. Does reading that letter refresh your recollection as to whether you received Government Exhibit 18-1 from the Marine Midland Bank?

A. Yes, it does.

Q And what is 18-1?

A. 18-1 is a photocopy of a signature card in the name of Joseph Gay with the Account Number 781-51360-0 at the Clinton Street Office.

Q I am showing you Government's Exhibit 26-2. Would you identify that, please?

A. It is a letter dated May 18, 1972 from Marine Midland Bank Western and forwarded to my attention.

Q Would you read that to yourself, please. Does that refresh your recollection?

A. Yes, it does.

Q I am asking you to look at Government's Exhibit 22 and 23 again and I ask you again, did you receive those documents from Marine Midland?

A. Yes, I did.

Q. And would you identify those documents, please?

A. Exhibit 22 is a savings account withdrawal to the Account 78145069-1 dated 4-1-70 signed by Joseph Gay in the amount of $40,000. Exhibit 23 is a photocopy of the savings account withdrawal to the Account 781- -

MR. MURPHY: Your Honor, I object to reading from something that is not in evidence.

THE COURT: Mr. - -

MR. MELLENGER: I will withdraw the question.

THE COURT: Are there going to be originals here or are the originals destroyed?

MR. MELLENGER: The originals are destroyed but I have a further foundation for these Exhibits, your Honor.

THE COURT: Mr. Murphy, you have seen all these Exhibits?

MR. MURPHY: Yes, your Honor.

THE COURT: Is the objection made here because these are not originals?

MR. MURPHY: No, your Honor. I would suspect as I understand it and in my discussion with the District Attorney it was going to be necessary to bring somebody from the bank.

THE COURT: I see, to explain that they were destroyed?

MR. MURPHY: No, your Honor, for other reasons.

THE COURT: You would want to have the man from the bank explain these?

MR. MURPHY: Yes.

THE COURT: All right. I think that may be better because he understands the bank procedures.

MR. MELLENGER: Very well, your Honor.

THE COURT: But as far as how these copies were made, Mr. Mellenger - -

MR. MELLENGER: I just basically wanted him to identify them.

THE COURT: All right.

MR. MELLENGER: Can I have one second, your Honor?

THE COURT: Yes.

BY MR. MELLENGER:

Q Mr. Krysztof, at the meeting on June 8, 1972 at the Park Lounge, when you explained or asked Mr. Gay about the cash on hand, did Mr. Gay seem intoxicated to you at all?

A No, he did not.

MR. MELLENGER: I have no further questions, your Honor.

THE COURT: Mr. Murphy.

CROSS EXAMINATION BY MR. MURPHY:

Q Yes, your Honor. Mr. Krysztof, as I understand it, the first time that you met Mr. Gay was on December 28, 1971, is that correct?

A. Yes.

Q All right. Now, at that time, Mr. Krysztof, you introduced yourself to him in the Park Lounge, is that true?

A. Yes, sir.

Q And there is where you showed him your credentials and told him that you were a Special Agent?

A. Yes, sir.

Q At that time did you tell him that you were conducting criminal investigation?

A. No, I did not.

Q No. You just told him you were conducting an ordinary?

A. No, I didn't.

Q All right. As far as you know, sir, were you the first IRS Agent to approach Mr. Gay with regard to his tax matters for the years in question, namely '67 through '71?

A. I presume I was the first one. I do not know.

Q All right. In any event, there is a difference between the audit department of the Internal Revenue Service and the special agents of the Internal Revenue Service, isn't that right?

A. Yes, sir.

Q. And special agents concern themselves with criminal investigations, is that true?

A. That's correct.

Q. Now, to your knowledge, sir, was there any approach by the audit division or the civil division of the IRS to Mr. Gay, prior to your approaching him on December 28, 1971?

A. For the years in question, 1967, or 1968, 1969 and '70, not to my knowledge.

Q. All right. Now, the investigation at a later point other than December 28th expanded to include the year 1967 through, - and 1972, - I am sorry, '71, isn't that correct?

A. Yes, sir.

Q. Now, were you still a part of the investigation when this expansion took place?

A. No, I was not.

Q. Somebody else?

A. Yes, sir.

Q. Is that right? Now, you then, as I understand it, left the Park Lounge and went to Mr. Gay's home on Fredro Street?

A. Right.

Q. Did you again identify yourself?

A. Yes, I did.

Q. And did the agent who was with you, Agent Plant, did he identify himself?

A. Yes, he did.

Q. You then told him he was in a criminal investigation?

A. Yes, I did.

Q. All right. Now, he continued to answer questions during the course of that interview, isn't that right? That would be the original interview?

A. Yes, sir.

Q. At the conclusion of which he promised you that he would provide certain mortgage records, isn't that true?

A. Yes, sir.

Q. Now, during the course of your investigation you did determine, did you not, that the mortgages that Mr. Gay gave out were prepared by an attorney?

A. I don't understand that question.

THE COURT: You mean the papers?

BY MR. MURPHY:

Q. The papers, the mortgages themselves that were signed by the mortgagees.

A. Right, those were - -

Q Prepared by an attorney, were they not?

A I do not know that.

Q You don't know that. Did you ever get to see the actual mortgages themselves?

A Not until - -

Q The mortgages?

A Not until recently.

Q All right. Now, your investigation you were concerned then with the morgages to the extent that you asked Mr. Gay to provide you this material, isn't that correct?

A Yes, sir.

Q Now, isn't it a fact that on January 3, 1972, some six days following your initial interview at which time you told Mr. Gay you were engaged in a criminal investigation, that he called you at your office and told you that he had the mortgage material ready for you?

A That's correct.

Q Is that right?

A That's correct.

Q All right. Now, at that time you told him you would get to see him around January 6th or on January 6th at 2:30 to 3:00 p.m., isn't that right?

A Yes, sir.

Q I am sorry, 2:00 to 2:30 p.m.?

A Around that time, right.

Q All right, and what did he tell you?

A To come to his residence, that he would supply me the information that I had requested.

Q Well, didn't he tell you to call first to make sure so he could make sure he would be there?

A I don't recall that.

Q All right. In any event, you went down there and he showed you some handwritten sheets, did he not, with regard to the mortgages, the amount of the mortgage and the payment date, isn't that right.

A Yes, sir.

Q These were sheets made up by himself, is that true?

A Yes, sir.

Q In handwriting, his own handwriting?

A That's correct.

Q All right. Let me ask you, did you ever go to check whether any of these mortgages were ever recorded in the County Clerk's Office?

A Yes, I did.

Q When?

A Sometime, - sometime during the investigation, most likely afterwards.

Q Well, I don't want, "most likely". When did you do it?

A I don't recall when I checked.

Q All right.

THE COURT: Was it a week later, a month later, four months later, about when?

THE WITNESS: I don't recall, your Honor.

THE COURT: All right.

BY MR. MURPHY:

Q All right, but it was after the sixth day of January of '72, isn't that right?

A Yes, sir.

Q All right. Now, following, - when you saw these mortgages, did you look at the actual mortgage itself?

A On file at the County Clerk?

Q Yes.

A Yes, I did.

Q Or did you just look into the book to see that the mortgage was recorded?

A No. I looked at the actual mortgage.

Q Now, at that time, in looking at the actual mortgage, did you then learn that the mortgage itself had been prepared by an attorney?

A If an attorney's name was on the document, then it would have been prepared by an attorney.

Q Well, did you make any notes, any memorandum with regard to what you saw in the Erie County Clerk's Office?

A. No, I did not.

Q. All right. Now, as I understand it, you were only interested in, and all you received from Mr. Gay as of the day, January 6th, was eight sheets, - was his personal handwritten records with regard to some eight mortgages that were then in existence, isn't that right?

A. Yes, sir.

Q. Now, did you ever, during the course of your investigation, run down any mortgages that had been paid in full previously?

A. I do not believe so.

Q. Did you ever ask Mr. Gay whether or not he had had mortgages previous to this particular date which you have identified, that had been paid up, say a month before your investigation began?

A. I do not recall asking that question.

Q. Now, you would, of course, be concerned with that, would you not?

A. Yes, I would be.

Q. All right. You would want to know during the course of your investigation, how much the man had invested over the years, isn't that true?

A. Yes.

Q. Because what you were looking for was cash that could not be accounted for, isn't that right?

A Yes.

Q And which you then would term income to show an evasion, isn't that right?

A At that point, not necessarily so.

Q All right. In any event, you didn't bother to check how much he had invested previous to these particular existing mortgages?

A That's correct.

Q Now, did you, at any time, interview any of these individuals who had outstanding mortgages with Mr. Gay, with regard to how the money had been transferred to them, how the mortgage came about?

A No, I did not.

Q Not at all?

A No, sir.

Q And you were on the particular investigation from December up until June, isn't that true?

A That's correct.

Q Now, you were concerned, your first item of concern, of course, was these particular mortgages, isn't that right?

A Yes, it was.

Q All right. So much so that on January 6th or on January 3rd, Mr. Gay got the information together for you and gave it to you, is that true?

A. That's right.

Q. Now, at no time then, from January 6th through June 8th, did you at any time interview any of these individuals?

A. That's correct.

Q. But you did check the mortgages themselves?

A. Yes.

Q. Isn't that right?

A. Yes.

Q. Now, one mortgage was to a Mr. Bycina, isn't that right?

A. Yes.

Q. Now, when was that mortgage filed in the Erie County Clerk's Office?

A. Without looking at the County Clerk records, I could not say.

Q. Do you mean to tell me you went over to the County Clerk's office and you went through the entire mortgage and you didn't even bother to note when it was filed?

A. I don't recall making any note as to that.

Q. You just went and checked it out?

A. That's correct.

Q. Well, how did you happen to find out, how did you get to this Bycina mortgage?

A. Mr. Gay gave me the record regarding that mortgage.

Q No. All he gave you, according to you, all you can tell us is what the date of the first payment was, isn't that true?

A Correct.

Q All right. Now, you had to go to the County Clerk's Office and find out the date of the mortgage itself, isn't that right?

A That's correct.

Q What was the date of that mortgage?

A If I recall, that mortgage was made in 1960, or the first payment was made in 1960, but I cannot be sure without looking at the document itself.

Q All right. Well then, you have a copy, did you get a copy of the document itself?

A Of the mortgage that is on file with the County Clerk?

Q Yes. My question is, did you get a copy of the document itself?

A No, I did not.

Q All right. Did you make any notes or memorandum with regard to your, - with regard to your investigating or looking these mortgages over at the Clerk's Office?

A I wouldn't have taken the - -

Q No, did you?

A I don't recall.

THE COURT: Excuse me, Mr. Murphy. We cannot go on what the recollection of Mr. Krysztof was about these documents. There are so many of them and they are so detailed and there is so much detail there that is obviously immaterial to our inquiry.

MR. MURPHY: All right.

MR. MELLENGER: Your Honor, I would like to call the Court's attention to the fact there are certified copies of these documents available.

THE COURT: It does not matter whether he looked at them in detail. We cannot go ahead and have him give us his recollection of what they said. Go ahead.

BY MR. MURPHY:

Q All right. Now, the United States Attorney has provided Government Exhibit 97 which I believe these are stipulated to as a - -

MR. MELLENGER: They are certified copies.

MR. MURPHY: Certified and they can go into evidence as I understand it.

THE COURT: All right.

BY MR. MURPHY:

Q Now, this would be the Bycina mortgage, isn't that right?

A Yes, it is.

Q All right. Now, sir, are you familiar with the procedure of the Erie County Clerk's Office, wherein after a document, the original is recorded that the original is recorded, photstated, placed in a book and then the original is placed in a box, Box 206 in this particular case?

A Yes.

Q All right. Now, that box would then be rented to an attorney, isn't that true?

A I don't know that.

THE COURT: Why should that make, - you know and I know, Mr. Murphy, because we are lawyers, how the County Clerk handles these things, but what difference does it make in this lawsuit and I do not think Mr. Krysztof is obliged to make an investigation how the County Clerk records instruments.

MR. MURPHY: All right, your Honor.

THE COURT: That is not what we are here for. Let us get to what he did in this case as pertains to the things that matter.

BY MR. MURPHY:

Q I am sorry, sir. Did you, during the course of your investigation, learn that the Bycina mortgage $10,000 in cash was delivered to Mr. Bycina?

A. No, I did not.

Q All right. Did you learn, through your investigation on any of these mortgages, that cash was transferred to the individual.

THE COURT: Listen, there is no objection here but I do not thing again, what difference does it make whether cash was transferred or whether or not some check was made in the past. All he has testified about was Mr. Gay's records and that is all he is here for, the records that Mr. Gay gave to him. As to the details of the transaction between Gay, Bycina, Mazurowski and the rest of those mortgagees, he did not talk to those people. Did you at all, Mr. Krysztof?

THE WITNESS: No, I did not.

THE COURT: All right.

BY MR. MURPHY:

Q Now, at the close of the interview on January 6th, did you indicate to the taxpayer, that you would be returning the sheets to him on January 10th of '72?

A. Yes, I did.

Q And at that time did he indicate to you to call first to make sure he was in?

A. I don't recall.

Q In any event, you did come back and meet him, isn't that right?

A. Yes, I did.

Q And did you come back with John Quinn on January 11th?

A. I believe I did. I would have to see the document receipt to know if I came with John Quinn.

Q All right. In any event, you returned the sheets to him and that's the time you asked about paying the tax and he said he did it through his business account?

A. Right.

Q All right. Now then, during the course of your conversations with Mr. Gay, you were presented from him Exhibits 87, - I am sorry, 85,86 and 87, isn't that true?

A. Yes.

Q Now, this was, - I am calling your attention to 86. These are again handwritten records of Mr. Gay, isn't that true, with regard to his printing account?

A. His printing business, yes.

Q. His printing business, I am sorry, going from '62 through 1971, is that right?

A. Yes, it was '72, - maybe it is '71.

Q. All right, '72, up until February of 1972, is that right?

A. Yes.

Q. And looking through here in this, Mr. Gay has receipts of such as $7.50, $9.00, $3.00, $6.00, all those are recorded, are they not?

A. Yes, they are.

Q. All right. Then he gave you, did he not, all of his Marine Midland Trust Company records that he had with regard to a statement of account, isn't that right?

A. Yes, sir.

Q. All right. He then gave you all of his checks, did he not?

A. Yes, he did.

Q. All of which you were free to print, isn't that true?

A. Yes.

Q. Make copies of, make no objection to that, isn't that right?

A. That's correct.

Q. He cooperated fully through this entire investigation, did he not?

A. With me he did, sir.

Q All right. Refused nothing that you asked for, isn't that true?

A That's correct.

Q All right. Now we go to the June 8th conversation with Mr. Gay wherein you introduced him to Brownell?

A Yes.

Q Now, did you make a memorandum of that interview?

A No, I did not.

Q Mr. Brownell did, isn't that true?

A Yes, he did.

Q Now, the interview, according to you, took place in the Park Lounge, isn't that correct?

A Yes, sir.

Q The Park Lounge, as a matter of fact, is Mr. Gay's brother's tavern, isn't that true?

A I believe it to be, yes.

Q All right, and the interview took place in the back room of Mr. Gay, - or Mr. , - the Park Lounge, isn't that right?

A Yes.

Q You sat down at a table, Brownell and Mr. Gay sat at the table, isn't that right?

A Yes.

Q Did you have anything to drink that day?

A No, sir.

Q Did Mr. Brownell?

A No, sir.

Q Were you introduced, by the way, to the bartender as, - I am sorry, did Mr. Gay introduce the bartender to you as being his nephew?

A I don't - -

Q If you recall.

A I don't recall.

Q All right. Now then, Exhibit, - I am sorry, I can't read this. I want to show you, sir, a copy of Court Exhibit Number 5. That would be a memorandum, would it not, of the interview and that would have been, - not having been made out by you, would have been made out by Brownell, isn't that right?

A That's correct.

Q Where does Mr. Brownell say that the interview took place?

A It says on here 3 Fredro Street.

Q Now, you didn't have the interview there, did you?

A No, we did not.

Q You were in the back room of a tavern and you were asking Mr. Gay about cash he would have on hand, isn't that true?

A Yes, sir.

Q And it is also true that he met Brownell for the first time was some minutes before this interview took place, isn't that right?

A. That's correct.

Q. That's all you talked about?

A. Yes, sir.

Q. Nothing else?

A. I introduced Mr. Brownell to him, to Mr. Gay.

Q. Right.

A. I explained the situation that I was - -

Q. Getting off - -

A. No longer going to be investigating the case.

Q. The only thing you talked about with regard to the investigation itself was cash on hand?

A. That's correct.

Q. Now, when you talked to Mr. Gay about cash on hand previously, Mr. Gay told you in the initial interview that he could never know that because of all of the various things that he felt taking into account, mortgage payments and stuff like that, isn't that true?

A. Yes.

Q. And again, you asked him a second time, though?

A. Yes, sir.

Q. Isn't that right?

A. Yes, sir.

MR. MURPHY: That' all.

THE COURT: Anything further, Mr. Mellenger?

REDIRECT EXAMINATION BY MR. MELLENGER:

Q Just one question, your Honor. Agent Krysztof, this meeting at the Park Lounge on June 8th, 1972, approximately what time of day was that?

A I believe it to be approximately around noon.

MR. MELLENGER: Okay. Nothing further, your Honor.

THE COURT: Thank you, Mr. Krysztof.

RECROSS EXAMINATION BY MR. MURPHY:

Q I am sorry, your Honor, just one question. Do you recall whether or not the bar itself was crowded?

A There were some patrons in there but - -

Q There were some patrons?

A There were some people in there.

MR. MURPHY: That is all. Thank you.

THE COURT: All right. Thank you, Mr. Krysztof.

THE WITNESS: Thank you, your Honor.

THE COURT: Next witness, please.

MR. MELLENGER: The Government calls Walter Herr.

* * * * * * * * * * * * *

WALTER J. HERR (44 Lyncrest Terrace, Cheektowaga, New York), a witness called by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MELLENGER:

Q Mr. Herr, where are you employed?

A Buffalo Savings Bank.

Q What is your position there?

A I'm supervisor of the records and research section.

Q Now, pursuant to a subpoena did you furnish Federal Agents with documents of the bank pertaining to Joseph and/or Stella Gay for the years 1967 through 1971?

A Yes, I did.

Q I am showing you Government's Exhibits 27 through 45 and 47 through 57 and ask you to look at those, please. Are these the documents you furnished?

A These are all the documents that I furnished, that's right.

Q And are you the custodian of those records?

A Yes, I am.

Q Are those records maintained and made in the regular course of business?

A Yes, they are.

Q Calling your attention to Government Exhibit Number 27, would you identify that, please?

A. This is a transcript of a savings account, Account Number 763292 maintained at our main office in the name of Joseph Gay. There is also an original signature card for that account number in the name of Joseph Gay.

Q. What is a transcript of account?

A. Transcript is a sheet that we make up taken from the microfilm copy of the daily or quarterly printout or sheets that we get from the computer center in lieu of a ledger card that we previously had years ago.

Q. And what information is contained on that?

A. Well, it has a list of dates of transactions, withdrawals made against the account, deposits, interest and the balance that is maintained.

Q. And do you know who prepared that?

A. I prepared this. This is one that I prepared.

Q. Is that a record made and maintained in the ordinary course of business of the bank?

A. Yes, it is.

MR. MELLENGER: Your Honor, I would like to move Government Exhibits 27 through 45 and 47 through 57 into evidence.

THE COURT: Are there any objections?

MR. MURPHY: Your Honor, yes, I have had an opportunity to look at them.

CROSS EXAMINATION BY MR. MURPHY:

Q Sir, looking through these Exhibits without going over all of them, some of them are in the name of Stella Gay, isn't that true?

A That is correct.

Q And some are in trust for other individuals?

A If I can recall some, I believe, yes. I would have to look at them.

Q All right.

A I just don't recall every one.

Q But not all of them relate to Joseph Gay alone, isn't that true?

A True.

MR. MURPHY: Your Honor, I am going to object to any Exhibits that do not relate to the defendant.

THE COURT: These are simply, now, Mr. Herr, these are records kept in the regular course of business of your bank?

THE WITNESS: That is correct, sir.

THE COURT: On that ground we will mark them in evidence, as far as whether or not they are relevant to this procedure at all we will take up as we go on and listen to other witnesses.

(Government Exhibits Numbered 27 through 45, respectively and inclusive and Government Exhibits Numbered 47 through 57, respectively and inclusive, received in evidence.)

REDIRECT EXAMINATION BY MR. MELLENGER:

Q Calling your attention to Government's Exhibit Number 27, that is for an account in the name of Joseph Gay, is it not?

A. That is correct.

Q And would you read the year and account balances, please?

A. The year and account balance 12-27-66 was $8,754.81 and the 12-31-71 balance was five thousand eighty-four fifty-seven. Do you want all of them?

Q The year ending balance.

A. Do you want the line, do you want them right down the line?

Q Yes, please. I am sorry.

A. Balance of 12-27-67 was ten thousand forty-nine ninety one. 12-26-68, ten thousand five sixty-one eighty-five. 12-26-69, eleven thousand one o one fifty-seven. 12-31-70, eight hundred thirty-one dollars thirty-two cents and I am repeating 12-31-71, five thousand eighty-four fifty-seven.

Q Calling your attention to Government Exhibit Number 28, would you identify those, please?

A. These are deposit tickets on Account 763292 in the name of Joseph Gay for various dates.

Q Calling your attention to a deposit ticket dated September 2, 1971, does that ticket indicate the makeup of that deposit as to currency or checks?

A. Yes, it does.

Q And what was the makeup of that deposit?

A. It shows that coupons were deposited.

Q Will you identify Government's Exhibit Number 29, please?

A. This is a transcript of an Account Number 763298 in the main office in the name of Stella Gay. Also original signature card for that same account.

Q And what were the year end account balances for that account?

MR. MURPHY: Your Honor, I am going to object to this on the ground it is immaterial and irrelevant.

THE COURT: I will overrule it, the mere reading of these figures. If they are not relevant later on, - Mr. Mellenger, I supp[illegible] have a purpose, you are going to connect these up later on?

MR. MELLENGER: Yes, your Honor.

THE COURT: If it is not, I do not know what the figures will be, ladies and gentlemen, but for the present, it does not make any difference, but in this kind of a case, as Mr. Mellenger explained in the beginning, that you have a number of pieces and you put them in and sometimes, of course, if you have two puzzles mixed up and you got to the final resulting pieces that do not count, you push to the side. That is what we have to do here. You are going to connect this material up later on?

MR. MELLENGER: Yes, your Honor.

THE COURT: All right. For the present, since the witness is here, we will read it into the record and we will note the objection and overruled.

THE WITNESS: The year and balance for 12-27-66 was eleven thousand three seventy-seven sixty four. 12-27-67, twelve thousand four eighty-two seventy-two. 12-26-69, thirteen thousand seven eighty-eight ninety-nine. 12-31-70, $32.85, and

12-31-71, sixty-two ninety-five nineteen.

BY MR. MELLENGER:

Q Would you identify Government's Exhibit Number 30, please.

A. These are two deposit tickets on Account 763298 in the name of Stella Gay, two different dates.

Q Calling your attention to the deposit ticket dated January 15, 1971 does that indicate the makeup as to whether that deposit was in cash or currency, - cash or checks, excuse me.

A. It shows a currency deposit.

Q And what is the amount?

A. $1,000.

Q Would you identify Government's Exhibit Number 31, please.

A. It is a transcript of an Account Number 760861 at the main office in the name of Joseph Gay or Stella Gay.

Q And what are the year and balances of that account, please?

A. 12-27-66 was $8,753.41. 12-27-67, ninety-seven twenty-four eighty. 12-26-68, ten thousand two twenty-twenty. 12-26-69, ten thousand seven forty-two forty-six. 12-31-70, $34.12. 12-31-71, fifty-two eighty-nine fifty-five.

Q Mr. Herr, I have noticed that while reading these year end account balances, you used a date other than December 31st. Why is that?

A Well, at that time they were paying interest on a different basis. It was the last three days that was credited, one of the last three days.

Q What is Government's Exhibit Number 32?

A That is, - these are deposit tickets on Account 760861 in the name of Joseph Gay or Stella Gay and show various dates.

Q Calling your attention to the deposit ticket dated January 15, 1971, is that a currency or a check deposit?

A January 15, '71 was a thousand dollar currency deposit.

Q Identify Government's Exhibit Number 33, please.

A That is a transcript of an Account Number 760865 at the main office in the name of Joseph Gay as trustee for Stella Gay. Also the original signature card for that same account.

Q Would you read the year and account balances for that account, please?

A 12-27-66 was six thousand eight hundred twelve dollars forty-two cents. 12-27-67, seventy-six eighty-four ninety-two. 12-26-68, eight thousand seventy-six thirty-nine. 12-26-69, nine thousand twenty-two ninety-two. 12-31-70, $28.60, and 12-31-71, balance fifty-one twenty-seven fifty-one.

Q This transcript of account and all these transcripts of account you have been reading off, would they contain all transactions from the starting date to the ending date shown thereon?

A They show all transactions, that's right.

Q Will you identify Government's Exhibit Number 34, please?

THE COURT: Before we take up 34 we will be in recess for a few minutes, ladies and gentlemen. Maybe about 10 minutes and then we will return and listen to the testimony.

(Recess taken at 11:31 a.m.)

* * * * * * * * * * *

PROCEEDINGS: After recess, 11:48 a.m.

APPEARANCES: As before noted

(Defendant present.)

(Jury present.)

WALTER G. HERR, a witness called by and on behalf of the Government, having been previously duly sworn, resumed the witness stand and testified further as follows:

REDIRECT EXAMINATION BY MR. MELLENGER (Resumed):

MR. MELLENGER: Okay to proceed, your Honor?

THE COURT: Surely.

BY MR. MELLENGER:

Q Mr. Herr, before we adjourned, I had asked you to identify Government Exhibit Number 34. Would you do that, please?

A These are deposit tickets on Account Number 760865 in the name of Joseph Gay as trustee for Stella Gay, deposits of various dates.

Q Calling your attention to deposit ticket dated July 7, 1971, was there any currency deposited on that date?

A There was a currency deposit of $378.22.

Q And calling your attention to the deposit ticket dated January 15, 1971, is there a currency deposit of that date?

A There is a $1,500 deposit, currency.

Q Calling your attention to a deposit ticket without a date written on it and you identify a date when that deposit was made?

A There is a date on the back, a teller's date.

Q What date is that?

A February 27, 1970.

Q And what kind of deposit was that?

A That was a check deposit.

Q In what amount?

A $1,394, no cents.

Q Could you identify Government's Exhibit Number 34-1?

A That is a photocopy of a check drawn on the Gulf Insurance Group, Dallas, Texas, in the amount of $1,394, no cents.

Q Who is that check payable to?

A Payable to Stella Gay.

Q Why would the bank keep a photocopy of a check drawn on another bank as a part of its business records?

A Well, all exchanges or checks that are deposited on a daily basis are microfilmed each day for records and if a request is made for a copy, we have the film on hand from which we make the copy.

Q Can you tell what account that was deposited into?

A. Deposited into Account 760865.

Q. Whose endorsement appears on the back thereof?

A. Stella Gay as the first endorser and J. Gay as the second endorser.

Q. Would you identify Exhibit Number 35, please?

A. This is a transcript of an account Number 760864 at the main office in the name of Stella Gay as trustee for Joseph Gay. Also, the original signature card for that same account.

Q. Would you read the year and balances of that account, please?

A. 12-27-66, balance was seven thousand forty-four seventy-six. 12-30-67 was seventy-nine twenty-nine o nine. 12-25-68, $8,333.02. 12-26-69, ninety-two ninety-two sixty-seven. 12-30-70 was $99.19 and 12-30-71 was $5,820.28.

Q. Would you identify Government Exhibit Number 36, please?

A. These are deposit tickets made on Account Number 760864, various dates.

Q. And as for the Stella Gay as trustee for Joseph Gay account, is it not?

A. That is correct.

Q. Calling your attention to the deposit ticket dated January 15, 1971, was there a cash deposit on that date?

A. It shows a currency deposit of $1,500.

Q. Would you identify Government's Exhibit Number 37, please?

A. This is a transcript of an account Number 760862 at the main office in the name of Stella Gay as trustee for Lorraine Gay. Also, the original deposit ticket for that account number.

Q. And what are the year and balances of that account?

A. 12-27-66 the balance was $7,044.76. 12-27-67, seventy-nine twenty-nine o nine. 12-26-68 was $8,333.02. 12-26-69 was eighty-seven fifty-eight eighty-six.

Q. Does this transcript indicate when the account was closed?

A. Yes, it does.

Q. When was that?

A. 4-1-70.

Q. Thank you, and what was the amount of the withdrawal to close that account?

A. $8,869, no cents.

Q. Would you identify Government Exhibit Number 38, please?

A. That is a transcript of an Account Number 760863 at the main office in the name of Joseph Gay as trustee for Dorothy Gay. Also the original signature card for that account.

Q. And what are the year-end balances of that account, please?

W. J. Herr, for Government, Re-direct.

A. 12-27-66 was $6,320.41. 12-27-67, seventy-one sixty-seven eighty-three. 12-26-68 was seventy-five thirty-two ninety-five and 12-26-69 was seventy-nine seventeen eighty-seven.

Q. Does that indicate when that account was closed?

A. It shows 4-1-70 as the closing date.

Q. What was the amount of withdrawal to close that account?

A. $8,017.44.

Q. Would you identify Government's Exhibit 39, please?

A. That is an account, - a transcript of account Number 809654 at the main office in the name of Joseph Gay as trustee for Joseph Gay. Also the original signature card for that account number.

Q. And what are the year-end account balances for that account?

A. 12-27-66 was fourteen fifty-nine sixty-eight. 12-27-67 was $1,534. 12-26-68 was $1,612.13. 12-26-69 was thirty-one seventy-one o two. 12-30-70 was $3,334.11 and 12-31-71 was $3,504.99.

Q. What is Government's Exhibit Number 40?

A. Two deposit tickets, Account Number 809654, name of Joseph Gay as trustee for Joseph Gay.

Q. Calling your attention to these deposit tickets are not dated on the face. Can you tell what dates these deposit tickets are for?

A One is from August 20, 1969. The other April 2, 1969.

Q The one for August 0, 1969, what form was that deposit in?

A It was a transfer.

THE COURT: Mr. Mellenger, Mr. Murphy, could you come over here, please?

(Sidebar conference held between Court and counsel as follows:

THE COURT: Mr. Murphy, I realize you objected to Mrs. Gay, but is there anything here that you object to?

MR. MURPHY: All of this as to the relevancy of Mrs. Gay. All the rest is in.

THE COURT: Couldn't we just stipulate to all this business?

MR. MURPHY: Sure. It is all in.

THE COURT: Why do we have to have him go through each and every card?

MR. MELLENGER: I want to get the year-end balances.

THE COURT: It is in the record. Your expert can look at the record and see the year-end balance. The Buffalo Savings Bank was $10,007. It is all there. I do not see how it helps to have Mr. Herr go through each and every one of these cards and read it off.

MR. MELLENGER: Okay.

THE COURT: Then he is here for cross examination and if there are any signatures you cannot read or if there is any special information you want to bring out - -

MR. MELLENGER: Okay.

THE COURT: Sometimes you ask whether it is in cash or check. Maybe that makes a difference, I don't know. Why don't you just refer to the special things on each one?

MR. MELLENGER: Okay.

THE COURT: Because your witness certainly can, if these are in evidence, he can read the ending balance or year-end balance or balance during the year if it is important.

MR. MURPHY: I understand Quinn has utilized all of these and will testify to them.

MR. MELLENGER: There is quite extensive evidence on these account balances.

THE COURT: It does not help to have him read it.

MR. MELLENGER: I can have him identify the accounts.

THE COURT: He should, I suppose. All right.

(Sidebar conference concluded.)

BY MR. MELLENGER:

Q Mr. Herr, I would ask you what form the deposit was in which was made on August 20, 1969?

A It shows that it was a transfer from a previous account 809648.

Q In what amount?

A $380.34.

Q And as to the deposit made April 2, 1969, what form was that in?

A That was also a transfer from an Account 809646 in the amount of eight thousand forty-six and sixty-eight cents.

Q Would you identify Government Exhibit Number 41, please?

A This is a transcript of an account Number S-20284 at our Seneca Office in the name of Joseph Gay or Stella Gay. Also the original signature card for that same account.

Q And that is for the period 12-27-66 through 12-31-71, is it not?

A That's correct.

Q Would you identify Government's Exhibit Number 42, please?

A Deposit tickets for Account Number 20284, Seneca Office in the name of Joseph Gay or Stella Gay.

Q Calling your attention to the deposit made on September 2, 1971, what form was that deposit made in?

A It was made in currency deposit, sum of a thousand dollars.

Q Calling your attention to deposit ticket dated July 7, 1971, was there any currency deposited on that date?

A $250 currency deposit.

Q Thank you. Would you identify Government Exhibit 43 please?

A This is a transcript of an Account S-52546 at our Seneca Office in the name of Joseph Gay as trustee for Dorothy Gay. Also the original signature card.

Q And this is a transcript beginning September 27, 1966 up to and including April 1, 1970, is it not?

A That is correct.

Q And what happened on April 1, 1970?

A The account was closed.

Q And what was the amount of that withdrawal to close that account?

A $8,236.41.

Q Calling your attention to Government Exhibit Number 44, what is that?

A This is a deposit ticket, Seneca Account Number 52546 in the name of Joseph Gay. It shows a deposit of $1,590 in the form of a check.

Q Government's Exhibit Number 45, would you identify that, please?

A A transcript of Account Number S-52547 at our Seneca Office in the name of Joseph Gay as trustee for Lorraine Gay. Also the original signature card for that account number.

Q This is a transcript beginning December 27, 1966 and up to and including April 1, 1970, is it not?

A That's correct.

Q And what happened on April 1, 1970?

A The account was closed, withdrawal made for $8,236.41.

Q Would you identify Government Exhibit Number 47?

A This is a withdrawal on Account 3-20284.

Q In what amount?

A $12,000.

Q And whose signature appears on that?

A Joseph Gay.

Q And does it state the purpose of that withdrawal?

A A draft was issued for that withdrawal.

Q Would you identify Government's Exhibit 47-1, please?

A This is a draft by our bank on Chemical Bank, New York.

The amount $12,000.

Q And what date was that?

A October 9, 1970.

Q And who is that made payable to?

A It is payable to Joseph Gay.

Q Can you determine from that instrument where that draft was cashed?

A It was cashed at Marine Trust, Marine Midland-Western.

Q Do you know the date?

A Looks like October 9, 1970.

Q And whose endorsement appears on the back of that draft?

A Joseph Gay.

Q Is there any other notation on the reverse of that draft?

A There is a number and a little writing which says, "Official Check", apparently. That is my interpretation. The number is 1072585 or 1072085.

Q Calling your attention to Government's Exhibit Number 48, would you identify that?

A This is a check drawn on Marine Midland Trust Company Western New York.

Q What is the number of that check?

A 1072058.

Q What amount.

A $12,000.

Q And what is the issuance of that check?

A October 9, 1970.

Q And who is that payable to?

A It is payable to the Buffalo Savings Bank.

Q And there is a word "remitter" on there. What is a remitter?

A That is the person that would purchase the check that would subsequently send the check to the payee.

Q And who is the remitter?

A Joseph Gay.

Q Okay. Can you determine from that check when that was deposited?

A It was deposited October 13, 1970.

Q And what account number was that deposited in?

A It looks like 17-011604-6.

Q Calling your attention back to Government Exhibit 47-1, to the notation which you read off the back as to the official check number is the check number on Government Exhibit Number 47, does that coincide with the check number written on the back of Government Exhibit Number 47-1?

A Yes, it does.

Q Thank you. Calling your attention to Government's Exhibit Number 49, what is that?

A This is the signature form for a special term savings account. The number 17-011604-6 in the name of Joseph Gay or Stella Gay.

Q Okay. Is that the account which Government's Exhibit Number 48 was deposited into?

A Yes.

Q Calling your attention to Government's Exhibit Number 50, what is that?

A This is a copy of a deposit ticket Number 17-011604-6 in the name of Joseph Gay or Stella Gay.

Q What is the amount of the deposit?

A $12,000.

Q Calling your attention to Government's Exhibit Number 51, would you identify that, please?

A This is a transcript of an Account Number 17-011604-6 at our main office in the name of Joseph Gay or Stella Gay.

Q Okay. That is the same account number shown on Government's Exhibit Number 50 which is the deposit ticket for $12,000, is it not?

A That is correct.

Q And was there an account or a deposit shown on October 13, 1970?

A Yes, there was.

Q In what amount?

A $12,000.

Q Okay. Was that the deposit which opened that account?

A That was the opening deposit, that is correct.

Q I am going to ask you to look at Government's Exhibits 47, 47-1, 48, 49, 50 and 51. Would you describe to the jury the transactions which these exhibits represent?

A Well, the first one, Number 47 is a withdrawal on our Seneca Account Number 3-20284 in the sum of $12,000 signed by Joseph Gay for which a draft was issued in the sum of $12,000; draft Number 01203665 was payable to a Joseph Gay, was endorsed by a Joseph Gay and was deposited or cleared through Marine on October 9, 1970 and there is the notation on the back official or OFF Check Number 1072085. 48 is the same number check 1072085 in the sum of $12,000, remitter Joseph Gay and made payable to Buffalo Savings Bank which was subsequently deposited on the 13th of October to account Number 17-011604-6. Exhibit 49 is the signature form for special term account Number 17-011604-6 in the name of Joseph Gay or Stella Gay which was opened on October 13, 1970 in the sum of $12,000. 50 is the deposit ticket used to make the deposit to Account Number 17-011604-6 which was in the name of Joseph or Stella Gay and shows a $12,000 deposit as being a check from Marine, and 51 is the transcript of account number 17-011604-6 in the name of Joseph Gay or Stella Gay which was at the main office and shows the initial deposit of $12,000.

Q Mr. Herr, those exhibits indicate that Mr. Gay made a withdrawal from an account at the Buffalo Savings Account, used the proceeds of that withdrawal, $12,000 to purchase a draft and then he took that draft to the Marine Midland Bank, cashed it, purchased Marine Midland Bank Draft for $12,000 on October 13, 1970 and went back to Buffalo Savings Bank and opened another account, is that correct?

A That is correct.

Q Is there a simple way in which that account could have been opened?

MR. MURPHY: I object.

THE COURT: Can you tell us from the record, Mr. Herr?

THE WITNESS: It could have merely been transferred.

THE COURT: From the record. What does the record indicate to you what was done?

THE WITNESS: Well, the records indicate that a draft was issued and deposited to Marine and then brought back a couple days later to our bank to open another account.

MR. MELLENGER: The question was asked whether there was a simpler way to open another account at the Buffalo Savings Bank.

MR. MURPHY: I object to that.

THE COURT: There are a lot of ways to open an account. We are talking about possibilities and then we get into all kinds of conjecture. We should go on what the records that Mr. Herr, as an experienced bank officer with the record, would indicate to him occurred so I will sustain the objection.

BY MR. MELLENGER:

Q Mr. Herr, is there any difficulty in transferring funds from one account at your bank to open another account at your bank?

A No, there is not.

Q Calling your attention to Government Exhibit Number 52, would you identify that, please?

A This is a transcript of an account 809648 at the main office in the name of Joseph Gay as trustee for Edward Gay. Also the original signature card for that account number.

Q And this shows all the transactions in that account commencing on December 27, 1966 through and including August 20, 1969, does it not?

A That is correct.

Q And what happened on August 20, 1969?

A. There were a number of withdrawals made on the account on that day.

Q Okay, and was that account closed on that date?

A. It closed the account, yes. The sum total closed the account.

Q Would you identify Government's Exhibit Number 52-1, please?

A. This is a withdrawal on Account Number 809648 and is dated 8-20-69 in the sum of $2,712.43 signed by a Joseph Gay.

Q Okay, and how is the word "Gay" spelled in that exhibit?

A. G-a-j.

Q Okay, and all these other exhibits you referred to, how was the name "Gay" spelled in there?

A. "G-a-y."

Q Calling your attention to Government Exhibit Number 53, what is that?

A. This is a draft drawn by our bank on Chemical Bank, New York. The number is 1-278011, payable to a Joseph Gay in the sum of $1,528.68.

Q Okay, and who is the remitter on that?

A. Leonard Gay.

Q Are there any notations on the back?

A The endorsement Joseph Gay as first endorser and the second endorser Stella Gay. Also an account Number 1-763298.

Q Calling your attention to Government's Exhibit Number 29, what is that again?

A This is a transcript of an account Number 763298 at our main office in the name of Stella Gay.

Q Okay, and Exhibit Number 53 was deposited to that account, was it not?

A According to the back of the draft number, it was deposited, yes.

Q What is Government's Exhibit Number 54?

A This is a draft by our bank drawn on Chemical, Number 1-165703 dated April 1, 1970, payable to Marine Midland Trust Company Western New York in the sum of $40,525.22, and remitter Joseph Gay.

Q Government's Exhibit Number 54-1?

A This is a photocopy of a draft, or I should say a U. S. Treasury Check in the sum of $160.65.

Q And who is that payable to?

A John, - I can't pronounce the name, it is K-r-y-w-c-z-u-k.

Q And calling your attention to the reverse side to that exhibit, is there any endorsements appear on there?

A The original payee's signature is on and underneath that second endorser, Joseph Gay.

Q Calling your attention to Government's Exhibit Number 55, would you identify that, please?

A These are four withdrawals made on various accounts at our bank, two being at the Seneca Office and two at the main office.

Q Would you read the account numbers, please?

A The numbers are S-52547.

Q And the amounts and the purpose.

A The amount was $8,236.41. S-52546 in the amount of $8,236.41. 760863 in the amount of $8,017.44 and 760862 in the amount of $8,869, and they all show the notation a draft was issued.

Q And they are all dated April 1, 1970, is that correct?

A April 1, 1970, that is correct.

Q Would you identify Government's Exhibit Number 56, please?

A This is a draft by our bank drawn on Chemical Bank, New York. The number 1-203666, dated October 9, 1970, payable to Marine Midland Trust Company Western New York in the sum of $65,000.

Q And who is the remitter on that draft?

A Joseph Gay.

Q What is the notation on the reverse thereof?

A Looks like T011710.

Q Finally calling your attention to Govenment's Exhibit Number 57, what is that?

A. These are withdrawals on our bank, five withdrawals, various accounts, various amounts, numbers are 763298 in the sum of $14,300; 763292 in the sum of $12,900; 78, - 760865 in the sum of $12,000; 760861 in the sum of $12,800, and 760864 in the sum of $13,000.

Q And those are all dated October 9, 1970, aren't they?

A. They are all dated October 9, 1970.

Q And it is noted on each one of those that it is to purchase a draft, is it not?

A. That is correct, the notation is made.

Q Have you ever had occasion to total up the amounts of those withdrawals?

A. Not offhand I haven't.

MR. MELLENGER: Nothing further of this witness, your Honor.

RECROSS EXAMINATION BY MR. MURPHY:

Q Mr. Herr, you indicated, sir, that the bank commits these to microfilm, is that correct?

A. That is correct.

Q And they also commit to microfilm deposits of checks to your bank, is that right?

A. Checks, that's true, deposited in our bank.

Q Yes.

A From customers are microfilmed daily.

Q Microfilmed?

A And we maintain the file, yes.

Q Now, your attention was called to Exhibits 47, 47-1 and 48, sir, is that correct?

A That's correct.

Q This, - 47, was there $12,000 withdrawn for the purpose of buying a bank check?

A Yes, there was.

Q All right, and when was that done, sir?

A It was done on October the 9th, 1970.

Q Now, the check that was purchased was made payable to Marine Midland, isn't that true? I am sorry, to Joseph Gay?

A That was correct.

Q And it was paid on the 13th, is that correct?

A No. It was issued October the 9th.

Q Yes.

A The paid date or the date it was deposited or cashed or whatever it was was October 9, 1970.

Q October 9th.

A That's the same date.

Q Well, what is the 13th here?

A That was the date that it cleared Chemical Bank in

New York, our depository bank, the date they paid it. That is what that stamp indicates.

Q Now, on the 9th, a Marine Midland Check was purchased for $12,000, isn't that true?

A That is correct.

Q Made payable to your bank?

A That is correct.

Q All right, which was deposited on the 13th, as I understand it, is that correct?

A That is correct.

Q Now, that would be a picture of this particular check, isn't that true?

A That is taken from the microfilm.

Q That is Exhibit 48?

A That is correct.

Q What occurred between Mr. Gay and the Marine Midland with regard to your check, of course, you have no idea, isn't that right?

A That's right.

Q There are a number of transactions involving many thousands of dollars whereby Buffalo Savings Bank money was taken and eventually ended up in Marine, isn't that true? There was a $40,000 withdrawal that ended up in a check made payable to Marine, is that true?

A Correct.

Q Let me ask you, sir, does Buffalo Savings Bank sell municipal bonds, sir?

A No, sir.

Q Does Marine Trust Company, sir, do they have a subsidiary corporation that sells or invests depositor's money in municipal bonds?

A I believe they do have, yes.

Q All right. Now, I note, sir, that on a number of the accounts that were shown to you, some there are deposit tickets for, others there are not, is that right?

A There would have to be a deposit ticket for each deposit.

Q In other words, every transaction where there was a deposit would show in your particular, - you would be able to produce, isn't that right?

A That is correct.

Q Now, on some of the accounts you have produced only, for example, 763298, account Number 763298, Stella Gay, there is two deposit tickets?

A Right.

Q All right. Now, I am sorry, there would be one, two, three, four, five, six, is that correct?

A There are six there, yes.

Q And two would be eight?

A Right.

Q And is that all the transactions that was involved with that account?

A That is what we were requested on the subpoena.

Q Well, to bring all of them or just be selective with regard to it.

A I don't know how to answer that other than to say that was what they requested.

Q Now, showing you these deposit tickets, are they microfilm reproductions?

A These are originals.

Q These are originals?

A These are all originals, yes.

Q That is Exhibit Number 28. 30 is an original?

A That is correct.

Q Is that correct?

A That is correct.

Q Now we have Buffalo Savings, Exhibit 45, Joseph Gay for, - as trustee for Lorraine Gay.

A Right.

Q Is that correct?

A That is correct.

Q There is a number of deposits, isn't that true?

A That is correct.

Q Now, were the deposit slips reproduced, sir, on that particular exhibit, Government Exhibit 45?

A They may have been because the originals were already destroyed because of the retention period.

Q That is what I am saying, but were you asked, sir, or subpoenaed, - were these deposit slips subpoenaed?

A Yes, they were.

Q And you did produce them?

A We don't have them.

Q Well, you can reproduce them by microfilm, could you not?

A No, not from microfilm.

Q Oh.

A These copies, - the copy, if there is one, from the deposit ticket would have been made from an original. These are all original deposit tickets here. We don't have microfilms of the deposits.

Q Deposit tickets.

A As such, that's right.

Q So then were you asked to check out whether or not checks would correspond to these deposits?

A Not that I know of.

Q Well, what I am trying to get at, sir, is very simply this; let's take Government Exhibit 45.

A Yes.

Q This is Joseph Gay as trustee for Lorraine Gay, is that correct?

A That is correct.

Q And the account was opened - -

A Here is the opening date at the bottom.

Q October 8, 1962.

A That is correct.

Q Is that right?

A That is right.

Q Now, it was opened with an initial deposit, was it? What would the initial deposit be?

A It would be the figure up there.

Q That would be fourteen hundred, is that right?

A That is true.

Q Now, as of 12-27-66, there was $4,967.80, is that right?

A That is correct.

Q On 1-10-67 $500 was deposited?

A Right.

Q All right. Now, sir, do you know whether that is a cash deposit or a check deposit?

A I wouldn't know unless I could see the deposit ticket.

Q All right, but we don't have the deposit ticket to see, isn't that right?

A That is correct.

W. J. Herr, for Government, Re-cross.

Q But if it had been a check that was deposited, you would have had a photostat of it, isn't that true?

A That's right.

Q Now, on August 28, '67, a deposit of one thousand five hundred and ninety cents was made, isn't that true?

A Right.

Q And you do not have a deposit ticket on that particular account, do you, for that deposit?

A Not the original, no.

Q No, but if it had been a check as opposed to cash, you would have, of course, been able to determine that by going through your checks, isn't that right?

A That's right.

Q All right. Now, did anybody in the Internal Revenue Service, - incidentally, Mr. Herr, who did you deal with in the Internal Revenue Service?

A Do you mean who?

Q Yes, what agent?

A There were numerous agents.

Q Oh, all right, numerous agents made the request to produce all of these records, is that correct?

A Well, they were signed by, I believe, the original subpoena by Mr. Mellenger, I believe.

Q All right. In any event, you were not requested to determine on this particular Exhibit 45 whether or not deposits were made in cash or check, is that true?

A We were, but we couldn't produce the original deposit because it had been destroyed. It was beyond the retention period.

Q Well, what I am trying to get at is if the deposit had been made by check, I understand that you photostat all checks where deposits are made, isn't that true?

A Right.

Q And when you deposit, - when a check is deposited in your bank to somebody's account, I assume you, on the back of the check, write the number of the account, isn't that true?

A This is what is supposed to be done, that is correct.

Q All right, so that you could identify through your checks of 1-10-67 if you had a $500 check which was the basis for this deposit with this account number written on it - -

A Right.

Q We could identify whether that was put in in the form of cash or check, isn't that right?

A That's correct.

THE COURT: Mr. Herr, we could do that now?

THE WITNESS: Yes, I believe.

THE COURT: We could do it now?

THE WITNESS: Yes.

THE COURT: These are your records, Mr. Herr. Would you still have the check?

THE WITNESS: We would have the microfilm.

THE COURT: The microfilm of the check?

THE WITNESS: Yes.

THE COURT: All right. Ladies and gentlemen, we will take a recess. I think that the first day of a tax trial is like the first day of a long journey. You sort of have to get used to it, so we will be in recess until 2:00 o'clock and resume the testimony in this case at that time. You may go out with the Marshal. Do not talk about the case over the recess break, please. You may walk out with the Marshal, please.

(Jury escorted from the courtroom.)

THE COURT: All right. We will be in recess.

(Recess taken at 12:38 p.m.)

* * * * * * * * * * * * * *

PROCEEDINGS: March 26, 1976, 2:00 p.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury not present.)

MR. MELLENGER: Your Honor, maybe we can take this offer. I have some exhibits which were introduced through Mr. Krsztof this morning.

THE COURT: Why not do this, Mr. Mellenger, Mr. Murphy does not object to most of these and rather than go through Exhibit 52, "Do you object" and so forth, talk to him and if he does not object, make a plain statement for the record. We can do that at the end of the day.

MR. MELLENGER: Okay.

THE COURT: If there are any there are problems about, let me know.

MR. MELLENGER: Okay, your Honor.

(Jury returns to the courtroom.)

WALTER G. HERR, a witness called by and in behalf of the Government, having been previously duly sworn, resumed the witness stand and testified further as follows:

RECROSS EXAMINATION BY MR. MURPHY (Resumed):

(Defense Exhibits Numbered 1 through 11, respectively and inclusive, marked for identification.)

BY MR. MURPHY:

Q. Now, Mr. Herr, at the close of the morning session we were discussing whether or not you could determine whether there was a check deposit or a cash deposit, isn't that true?

A. That is right.

Q. And I assume since the deposit slips are gone it would require somewhat of a search on your part, isn't that correct?

A. That is right.

Q. Now, I want to show you Defendant's Exhibits 1 through 11. I am sorry. Where are the exhibits?

MR. MELLENGER: There on the table.

BY MR. MURPHY:

Q. And I apologize for not having these Government exhibits in order. Defendant's Exhibits 1 through 11, sir, Government Exhibit 27, if you can find that, sir, relates, as I understand it to your Account 763292, is that true?

A. That is right.

Q. Now I want to show you Defendant's Exhibit 1 which is a Buffalo Savings account passbook, is that correct?

A. That is correct.

Q. And the name on it is Joseph Gay?

A. Right.

Q. It is for 763292 and it would be a matching exhibit, isn't that right?

A. That is correct.

Q. Now, with regard then, showing you Defendant's Exhibit 1, can you determine whether or not the deposit, sir, was by check or cash from the passbook?

A. Yes, you can.

Q. I see, so then this record would reveal whether it is cash or check, isn't that true?

A. That's right, if the teller used the proper identification.

Q. This is the account that went through under that name?

A. Right.

Q. All right. Now, Government's Exhibit 2 if you would relate to, - I am sorry, Defendant's Exhibit 2, if you would relate to Government's Exhibit 29, that would be 763298 in the name of Stella Gay.

A. That's right.

Q. And of course this is the passbook, Buffalo Savings Bank passbook 763298 in the name of Stella Gay.

A. Right.

Q. So this would be the book that reflects everything there, isn't that right?

A. That is right.

Q. 760, - I am sorry, Government Exhibit 31, that would be Bank Account Number 760061, I am sorry, 760861, is that it?

A. That is correct.

Q. All right. I show you Defendant's Exhibit Number 3 which would be 760861, Joseph Gay or Stella Gay.

A. That is right.

Q. Buffalo Savings passbook bearing that number, isn't that right?

A. Right.

Q. And again all the deposits and forms that they were made in would be reflected, isn't that true?

A. That is right.

Q. Now I am going to go through Exhibits, Defendant's

Exhibits 4, 5, 6, 7, 8, 9, 10 and 11 and ask you, sir, and then I will try and find the corresponding exhibits, all those are Buffalo Savings passbooks, are they not?

A. These are all Buffalo Savings Bank passbooks.

Q. Now, sir, so we can speed this up, Government's Exhibit 33, if you will just mention the number on the exhibit, I believe they are in order, Government Exhibit 33, 760865, the main office.

A. Number 4.

Q. 4?

A. Here it is here.

Q. That would be my Exhibit Number 4, is that right?

A. That is correct.

Q. That is the same thing contained in the passbook, right?

A. Right.

Q. Now, the Government Exhibit 37 would be 760862, is that, what is my number on that?

A. Your Number 6.

Q. All right. Government's Exhibit 38, 760863.

A. That is Number 7.

Q. All right. Government Exhibit Number 39, 809654.

A. That is Number 8.

Q. All right. Government Exhibit 41, 20284, 41; do I have 20284 there?

A. 20284.

Q. That would be number what?

A. Your Number 9.

Q. All right. Government's Exhibit 43, S-52546.

A. Your Exhibit Number 10.

Q. All right, and Government Exhibit S-52547.

A. Number 11.

Q. My Exhibit 11. That would cover all of them. I am sorry, my Exhibit 5 is 760864. Would that be Government Exhibit 34, did I show you that? In any event, I have an Exhibit Number 5 that is a Bank Account 760864, is that true?

A. That is correct.

Q. All right. Now, do you know of a Leonard Gay who works at the Buffalo Savings Bank, sir?

A. Yes, I do.

Q. And that would be the same spelling, G-a-y?

A. Yes.

Q. All right. Have there been times, sir, when the Buffalo Savings Bank has put on contests with regard to the opening of new accounts by the various employees and officers of the bank?

A. There have been.

Q. And I assume that if you open the most accounts you win this contest, would that be true?

A. Right.

Q. All right. Was there also a time during the course of the existence of these books, sir, when the Federal Government insured savings accounts up to a certain amount of money?

A. That's right. They have changed over the years.

Q. I understand that, but there was a time when they were insured up to ten thousand, is that right?

A. Right.

Q. So if you had more than the ten thousand in the bank and it was robbed, you could only get ten thousand back if the bank lost all its money, is that it?

A. That is the understanding I have.

Q. All right. Now, if you had an account in the name of Joseph Gay in the amount of $10,000 and then opened another account in the name of Joseph Gay or Stella Gay, could you insure that money to $20,000?

A. No, you could not.

Q. You couldn't?

A. No.

Q. All right. How about in trust for other individuals?

A. That was separate. That was a different type of account.

Q. All right. Now, let's take an example, sir, Exhibit Number 1, 760, - I am sorry, 763292. Again I apologize. I will offer these exhibits in evidence.

-

(Defense Exhibit Number 12 marked for identification.)

MR. MELLENGER: No objection.

THE COURT: They may be marked in evidence.

(Defense Exhibits Numbered 1 through 11, respectively and inclusive, received in evidence.)

BY MR. MURPHY:

Q. Now, looking at Exhibit 1 again, sir, the initial deposit, Exhibit 1 now in evidence, the initial deposit of $1,000 was made on July 9, 1957, isn't that true?

A. That's right.

Q. That is a $1,000 deposit?

A. Right.

Q. Can you tell me when the next deposit was made?

A. July 15, 1960.

Q. July, and the next deposit?

A. February 21, 1961.

Q. Now, on July 10, 1957 with respect to Exhibit Number 2 there was an opening deposit of $3,923.90, isn't that right?

A. That's right.

Q. That is in the name of Stella Gay, isn't it?

A. Correct.

Q. Now, that deposit was made by check, wasn't it?

A. It shows check symbol, that's right.

Q. Now, can you tell me when the next deposit was made?

A. July 15, 1960.

Q. That would be some three years later, is that correct?

A. Right.

Q. That was in the amount of $1,900?

A. Right.

Q. And then the next one in May of '61?

A. May 8, '61.

Q. Now then, looking at these accounts, sir, and coming to the date 10-9-70 or October 9, 1970 and again Exhibit Number 1, ten thousand, 10-9-70, there was a withdrawal of how much?

A. $12,900.

Q. And there is behind it "CK". What does that mean?

A. It means a check was issued.

Q. A check was issued?

A. Right.

Q. In that amount?

A. I couldn't answer that.

Q. Now, we went through again today, calling your attention to Exhibit 57 of the Government, 763, - Exhibit 57 we have 763292.

A. Right.

Q. You see that, that would be withdrawal of twelve thousand nine hundred.

A. That's right.

Q. And what does this --

A. That means a draft was issued for that.

Q. A draft. Now, was that a $12,900 draft or did all of them combined total one big draft?

A. It could be either way. I don't know.

Q. I see. Were you shown a draft in the amount of some $40,000 payable, - $65,000 payable to the, - payable to Joseph, - I am sorry, Marine Midland, payable to Marine Midland?

A. Yes, I recall that.

Q. Now, I would assume if these were added up that would amount to $65,000, is that true?

A. A quick calculation, yes.

Q. All right. Now, then we have this other draft of twelve thousand that you say eventually got back to your bank.

THE COURT: Mr. Murphy, excuse me just a minute, please.

MR. MURPHY: Surely.

THE COURT: Mr. James, will you come up.

(Conference had at the side bar between the Court and counsel in another matter.)

THE COURT: Mr. Murphy, whenever you are ready.

MR. MURPHY: Thank you, your Honor.

THE COURT: You may proceed.

BY MR. MURPHY:

Q. Showing you Government Exhibit 47-1, that is the draft of twelve thousand that you say purchased Exhibit, Federal Exhibit 34-1 which was, - no, I am sorry. I will withdraw that. I show you Government Exhibit 47-1 in evidence, you say that draft eventually purchased Government Exhibit 48 in evidence, isn't that right?

A. That is correct.

Q. Now, this $60,000 transaction, $65,000 transaction occurred on the same day, did it not, as this $12,000 transaction, namely, October 9, 1970, is that true?

A. That is correct.

Q. All right. What is the account?

A. That was the number for the draft from Marine.

Q. I want the account on this twelve thousand. Here it is.

Now, that draft resulted from a withdrawal on 10-9-70 of $12,000 by a check from Account Number 20284 which is Defendant's Exhibit 9 in evidence, isn't that right?

A. That is right.

Q. Now, you say that eventually got back into your bank?

A. That is correct.

Q. Is that right, so what we have here is some $87,000, - I am sorry, $77,000 that was withdrawn from your bank and checks made out to Marine, isn't that right?

A. Right.

Q. All right. Now then, on the 13th you got a check back from Marine for $12,000 made payable to Buffalo Savings Bank that was purchased by your own check, isn't that right?

A. That's correct.

Q. So what I am getting at, sir, this was not an isolated $12,000 incident; it was a $77,000 transaction, wasn't it?

A. That I can't answer. I can only go by what is here.

Q. Well, we do have, do we not, one check in the amount of $65,000 taken out on October 9, 1970 and another taken out in the amount of $12,000 on October 9, 1970?

A. Right.

Q. All right. Both of the remitter in all cases was Joseph Gay?

A. Right.

Q. Is that right, and the payee was the Marine Midland?

A. No, it wasn't.

Q. I'm sorry. One was Joseph Gay and the other was Marine Midland, is that right?

A. Right.

Q. And the twelve thousand was to --

A. Joseph Gay.

Q. Joseph Gay and the other was to Marine Midland?

A. Right.

Q. Now, when that twelve thousand got back to your bank it went into an account, did it not?

A. That's right.

Q. It did not enter the same type of account that it left, did it?

A. No. It went into a special term account, as I recall.

Q. I show you Defendant's Exhibit 12 for identification and ask you if on 10-13-70 that $12,000 check from Marine Bank to Buffalo Savings was deposited in an account to the, - to Joseph Gay or Stella Gay, 170116046?

A. That is correct.

Q. Is that right?

A. Right.

Q. It wasn't a savings account, was it?

A. Well, it is a saving but a special term savings.

Q. What does that mean as opposed to the type of account we have been dealing with?

A. It is open for a limited time at a special interest rate. The term could be anywhere from a year to five years or six years at the time. I am not sure.

Q. This was a higher rate of interest than the bank was paying?

A. That is correct.

Q. But there were some limitations on this deposit, isn't that correct?

A. That is correct.

Q. That it had to stay there for a certain amount of time?

A. That is right.

Q. And it earned interest, did it not, the account stayed open until 12-31-71, is that right?

A. Conceivably could have been later because there could have been other transactions in another book.

Q. Well, this book that we have here, can you tell me what that certificate of deposit is that is there?

A. I don't know.

Q. Or who wrote it or anything else?

A. I don't have the slightest idea. We don't use that terminology. Other banks may.

Q. Well, in any event, that is what happened to that $12,000, isn't that true?

A. That is correct.

MR. MURPHY: All right. I will offer Exhibit Number 12 in evidence.

MR. MELLENGER: No objection.

THE COURT: It may be marked in evidence. Keep a record.--

MR. MURPHY: Yes, your Honor.

THE COURT: And when Mr. White returns, we will take care of it.

(Defense Exhibit Number 12 received in evidence.)

BY MR. MURPHY:

Q. So now Exhibits, Defense Exhibits 1 through 12 in evidence would account for all of the exhibits of the Federal Government with regard to their deposits, withdrawals and opening of these accounts, isn't that right?

A. I assume as much, yes.

Q. And again without you searching your records by me providing you with these books you can tell whether the deposits in each of the accounts were made by check or cash, isn't that true?

A. That is right.

MR. MURPHY: All right. Thank you, sir. That is all.

REDIRECT EXAMINATION BY MR. MELLENGER:

Q. Mr. Herr, isn't a savings passbook basically a receipt given to the customer?

A. In effect it would be, yes, as well as a record.

Q. What would happen if there were an error made in that receipt?

A. If there were an error in posting?

Q. Yes.

A. It would be caught at the end of the day by the teller being out and it would be located and corrected accordingly.

Q. And how would the correction be made in the customer's passbook?

A. Well, the correction would go through without the passbook at the time it was discovered and then ultimately, when the passbook was presented, the correction would take place on the book automatically by correcting out the incorrect amount and putting in the correct amount.

Q. And who would do this?

A. This would be done by the teller.

Q. So in any event, if there were an error made in the passbook at some point, it would be corrected subsequent to the error?

A. That is correct.

Q. And you had mentioned something about Federal Deposit Insurance Corporation limits during cross examination.

A. Right.

Q. Are you aware what that limit was in 1970?

A. Not offhand, no, I don't.

MR. MELLENGER: Thank you. No further questions, sir.

RECROSS EXAMINATION BY MR. MURPHY:

Q. I am sorry, sir. You indicated not only is it a receipt, but it is a record because from this passbook you can determine what a search of, - I am sorry, - rather lengthy search of your microfilms on deposits as to whether check or cash deposit, isn't that right?

A. That is correct.

Q. All right. Now, just glancing through this, sir, you are able right away to distinguish where an error was made and where a correction would have been made, is that right?

A. That's right.

Q. It stands out rather prominantly in any passbook, doesn't it?

A. Right.

Q. All right. Now, taking Exhibit 1 and we will just flick through it if we can, do you see any errors there? There is a cross-out.

A. I don't know what that is. I didn't see that.

Q. I see there is a line drawn through the book. Could you interpret that?

A. Well, something somebody had written in in pen and ink and then it was correctly posted by the machine posting.

Q. I see. It was written in and then there was a machine posting put on, is that right?

A. Right. I can't answer why.

Q. All right. Well, there are times, I assume, that machine like any others may be down, could be down?

A. Could be down, yes, sir.

Q. Now, 2 again, just glancing through it.

A. Nothing there.

Q. No errors?

A. Nothing.

Q. That would be 3; 4.

A. Nothing.

Q. 5.

A. Nothing.

Q. 6.

A. Nothing there.

Q. 7.

A. No.

Q. 8.

A. Nothing.

Q. 9.

A. No.

Q. 10. I am sorry, 11.

A. Nothing on there.

THE COURT: Mr. Herr, you will have to keep your voice up, please, so the jury can hear.

THE WITNESS: All right. Thank you. Nothing.

BY MR. MURPHY:

Q. And the certificate.

A. No.

Q. I am sorry, the special.

A. Special term, no.

Q. So that looking through all of them you found one where there was nothing more than an inked notation that was duplicated by a machine notation the same time, or the next time the book got into the hands of somebody from the bank, is that right?

A. That is correct.

MR. MURPHY: Thank you. That is all.

MR. MELLENGER: Your Honor, may I just have one minute, please.

THE COURT: Surely.

REDIRECT EXAMINATION BY MR. MELLENGER:

Q. Mr. Herr, calling your attention to Defendant's Exhibit Number 12, that is the special term account, is it not?

A. That is right.

Q. Okay. Was that account still open on December 31, 1971?

A. Yes, it was.

Q. What was the balance of that account?

A. $12,910.60.

Q. And it does not indicate a withdrawal that date, does it?

A. No, it doesn't.

MR. MELLENGER: No further questions, your Honor. Thank you.

THE COURT: Nothing else? Thank you, Mr. Herr.

MR. MURPHY: I am sorry, Mr. Herr, if you could wait just a minute, please.

THE COURT: Mr. Herr, can you come back, please.

I guess there is another question.

MR. MURPHY: Your Honor, may I call this Defendant's Exhibit Number 13, please?

THE COURT: Will you mark it in pencil, Mr. Murphy.

MR. MURPHY: Surely.

THE COURT: And then when Mr. White comes back we will mark it.

(Defense Exhibit Number 13 marked for identification.)

RECROSS EXAMINATION BY MR. MURPHY:

Q. Sir, I want to show you Defendant's Exhibit 13 for identification and ask you, sir, if that is a Buffalo Savings Bank special term savings account?

A. Yes, it is.

Q. All right. When was that opened, sir?

A. This was opened October 18, 1972.

Q. Is it still in existence today?

A. That I wouldn't know, but from the passbook here, it was open at this time.

Q. I see.

A. I couldn't --

Q. What does this on the back mean where it says "Maturity date"?

A. That is the date that the account would fall due.

Q. It expires?

A. Expires and would have to be either renewed or transferred.

Q. Now, sir, showing you 12, on 10-13-72 12 expired, isn't that right?

A. That is correct.

Q. And the 13 was opened 10-13-72, is that correct?

A. That is correct.

Q. Now, at the time of the expiration as far as we know up to 12-31-71 there was $12,910.60, is that right?

A. Right.

Q. And on 10-18-72 this account opened for $20,000, isn't that right?

A. That's right.

Q. Again at six per cent, is that true?

A. That's right.

Q. Now, sir, would your records reflect, - not the ones you have here, but at the bank, would they reflect whether or not this account which is Defendant's Exhibit 12 were transferred over with more money into this account which is Defendant's Exhibit 13?

A. They would.

Q. If that was the situation your records would reflect that?

A. And if the teller followed procedure, yes.

MR. MURPHY: All right. Thank you, sir.

THE COURT: Thank you, Mr. Herr. Next witness, please.

MR. MURPHY: I will offer 13 in evidence, your Honor.

THE COURT: Any objection?

MR. MELLENGER: Yes, your Honor. I object to the relevance. It pertains to a '72 transaction.

MR. MURPHY: Your Honor, I would expect to tie it up with this $12,000 that made this circuitous route that the United States Attorney had --

THE COURT: All right. What we will do is we will mark it in evidence and then as to relevancy the jury can determine that later.

(Defense Exhibit Number 13 received in evidence.)

MR. MURPHY: Thank you.

THE COURT: We will just have to hear more of these bits and pieces of evidence, ladies and gentlemen, before we can make any decision.

MR. MELLENGER: The Government calls Frederick Meyers.

* * * * * * * * * *

FREDERICK MEYERS (1647 Union Drive, Merrick, New York), a witness called by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MELLENGER:

Q. Mr. Meyers, where are you employed?

A. Morgan Guaranty Trust Company of New York.

Q. What is your position there?

A. Supervisor, dividend and subscription area.

Q. And Morgan Guaranty Trust Company is the transfer agent for the Niagara Mohawk Power Corporation, isn't it?

A. Yes, it is.

Q. And how long has it been the transfer agent?

A. For approximately a period of twenty years or more.

Q. Pursuant to a subpoena, did you bring with you certain records of the Morgan Guaranty Trust Company pertaining to Joseph and/or Stella Gay?

A. Yes, I did.

Q. And why does the Morgan Guaranty Trust Company have records pertaining to these people?

A. Because they are stockholders of Niagara Mohawk.

Q. I show you now Government's Exhibits Number 96 and Number 96-1 through 96-14, and you have had a chance to look those records over previous to coming in here, did you not?

A. Yes, I did.

Q. Those are the records you brought with you, are they not?

A. Yes, they are.

Q. And are you the custodian of those records?

A. Yes, I am.

Q. And are those records made and maintained in the regular course of business of the Morgan Guaranty Trust Company?

A. Yes, they are.

Q. And those are microfilm copies, are they not?

A. Yes, they are.

Q. Do you know where the originals of those are?

A. The originals are destroyed with dividend checks. Those records are destroyed and these records are on microfilms.

Q. Before they are destroyed they are placed on microfilm?

A. Yes, they are.

Q. And the microfilm copies then become the business records of the Morgan Guaranty Trust Company, do they not?

A. Yes.

Q. Calling your attention to Government's Exhibit Number 96, what is that?

A. This is a transcript of the account of Joseph J. Gay, stockholder of Niagara Mohawk Power.

Q. And what information is contained on a transcript of account?

A. The buying and selling of stock.

Q. Okay, and for what period of time is that for?

A. This is for September of '66 through June of '73.

Q. I call your attention to Government's Exhibit Number 96-1 and what is that?

A. This is a transcript of the account of Stella Gay.

Q. And 96-2?

A. It is a transcript of the account of Joseph Gay or Mrs. Stella Gay, joint tenants.

MR. MELLENGER: Your Honor, I would like to move Government's Exhibits 96, 96-1 and 96-2 in evidence.

THE COURT: Any questions, Mr. Murphy?

MR. MURPHY: I have no objection, your Honor, except that as stated before with regard to Stella, your Honor, which I assume will be allowed.

THE COURT: Same objection noted, overruled, and mark in evidence. These are records kept in the regular course of business. We will have to determine later whether or not they are relevant to the issues in this case.

(Government Exhibits Numbered 96, 96-1 and 96-2 received in evidence.)

BY MR. MELLENGER:

Q. Calling your attention to Government's Exhibit Number 96 which is the transcript of account for Joseph Gay, what transactions are reflected on that account?

A. Purchase of 200 shares, September of '66; a purchase of 200 shares, November of '67; purchase of 100 shares, April of '69; a purchase of 500 shares, August of '69, and a stock dividend of 100 shares in September of '70.

Q. Can you tell from that transcript of account how many shares of Niagara Mohawk Mr. Gay owned as of

December 31, 1971?

A. Yes, 1,100 shares.

Q. And how can you tell that? There is no notation as to that date.

A. September of '70, that was the last activity of the account.

Q. And this record is current as of what date?

A. June of '73.

Q. Calling your attention to Government's Exhibit Number 96-1, in whose name is that account?

A. Stella Gay.

Q. And what transactions did she have reflected on that transcript?

A. Purchase of 200 shares, September of '66; purchase of 200 shares, November of '67; purchase of 100 shares, March of '69; purchase of 500 shares, August of '69, and 100 shares as a result of stock dividend, September of '70.

Q. Okay, and how many shares did she own as of December 31, 1971?

A. 1,100.

Q. And this record is also current to June of '73, is it not?

A. Yes, it is.

Q. And 96-2, that is a transcript of account for Joseph and Stella Gay, is it not?

A. Yes, it is.

Q. And what transactions are reflected on that account?

A. Purchase of 400 shares, June '70; stock dividend of 40 shares, September of '70.

Q. And what were the total number of shares jointly owned by the Gays as of December 31, 1971?

A. 440.

Q. And this record is also current as of June of '73?

A. Yes, it is.

Q. I show you Government Exhibit 96-3 and ask you to identify that.

A. These are dividend, - cancelled dividend checks issued to Joseph Gay for 1967.

Q. There are four of them, are there not?

A. Yes, there are.

Q. 96-4?

A. Dividend checks issued to Joseph Gay for 1968.

Q. There are four of those, are there not?

A. Yes, there are.

Q. 96-5?

A. Dividend checks issued to Joseph Gay for 1969.

Q. 96-6.

A. Dividend checks issued to Joseph Gay for 1970.

Q. 96-7.

A. Dividend checks issued to Joseph Gay for 1971.

Q. 96-8.

A. Dividend checks issued to Stella Gay, 1967.

Q. 96-9.

A. Dividend checks issued to Stella Gay, 1968.

Q. 96-10.

A. Dividend checks issued to Stella Gay, 1969.

Q. 96-11.

A. Dividend checks issued to Stella Gay, 1970.

Q. 96-12.

A. Dividend checks issued to Stella Gay, 1971.

Q. 96-13.

A. Dividend checks issued to Joseph Gay and Stella Gay, joint tenants, 1970.

Q. And 96-14.

A. Dividend checks issued to Joseph Gay and Stella Gay, joint tenants, 1971.

THE COURT: Can I see those? Go ahead, Mr. Mellenger.

BY MR. MELLENGER:

Q. Okay. In all of these exhibits which you have just identified with the exception of 96-13, there are four dividend checks, are there not?

A. Yes, there are.

Q. I call your attention to 96-13. How many dividend checks are there in that exhibit?

A. Two.

Q. And those are made out to --

A. Joseph Gay and Stella Gay, joint tenants.

Q. What year is that for?

A. 1970.

Q. Now, calling your attention to Government Exhibit Number 96-2 which is the transcript of account for Joseph and Stella Gay, when was that stock purchased, the first purchase of stock reflected on there?

A. June 1, 1970.

Q. And how often are dividends paid on behalf of Niagara Mohawk Power Corporation?

A. They were paid quarterly.

Q. Okay. In all these exhibits containing checks, they all are cancelled checks, are they not?

A. Yes, they are.

MR. MELLENGER: Thank you. I have no further questions, your Honor.

THE COURT: Mr. Murphy.

CROSS EXAMINATION BY MR. MURPHY:

Q. Is the pronunciation, sir, Meyers?

A. Yes, it is.

Q. Mr. Meyers, you are the transfer agent for the, - or your bank, I am sorry, - your bank is the transfer agent for the Niagara Mohawk Power Corporation, is that right?

A. Yes, it is.

Q. Now, sir, do your records reflect how this stock was purchased or through whom it was purchased?

A. I don't have that information here but it would reflect it.

Q. It would reflect it?

A. Yes.

Q. Would it reflect, sir, whether it was purchased on margin or by cash?

A. That I don't know.

Q. All right. What is the difference between purchasing on margin and cash?

A. I don't know.

Q. You don't know?

A. No.

Q. But you do know that there is two types --

A. Yes.

Q. Or two methods of purchasing?

A. Yes.

Q. One cash and one margin?

A. Yes.

Q. All right. Now, these particular stocks that were purchased, would your records reflect the purchase price for these stocks, sir?

A. Yes, they would.

Q. And would that be contained within the records that are now in the courtroom?

A. No.

Q. That information was not requested either, is that right?

A. No.

Q. All right. Now, the dividend checks that were paid when, - do you handle the payment of the dividends, sir, your company?

A. Yes.

Q. Your bank, I am sorry.

A. Yes, we do.

Q. All right, and when you pay a dividend check to an individual, what records are made out other than the dividend check?

A. The amount of money.

Q. The amount of money. At the end of the year for tax purposes do you send any information form to the taxpayer?

A. Yes, we do.

Q. What do you send?

A. We send a tax form indicating the amount of money received in that particular year for that particular holder, for a particular holder.

Q. All right. He gets that. I assume a copy is sent to the Federal Government also?

A. Yes, that's correct.

Q. To the IRS?

A. Yes.

Q. So he gets like a "B" copy --

A. Yes.

Q. And the Government the "A" copy?

A. Yes.

Q. All right, so when a person gets dividends from your bank with regard to Niagara Mohawk, the IRS knows that he got those dividends, isn't that right?

A. Yes.

Q. All right, and you say that the amount of money expended for this particular stock at the time of its purchase you were not subpoenaed to bring that information, is that right?

A. That's correct.

Q. All right, and I assume you were not subpoenaed, -

do you retain a copy of the information sheet that you sent to the Government and to the taxpayer?

A. Yes. We still maintain that.

Q. All right. Were you required by the Government to bring that pursuant to subpoena?

A. No.

Q. All right. Incidentally, the stock dividend, was that a ten per cent stock dividend or what?

A. I believe it was a ten per cent stock dividend.

Q. All right. Now, would that be reflected on an information sheet to the taxpayer, - I am sorry, - to the stockholder for tax purposes?

A. Yes. They would be made aware of it.

Q. And also the Federal Government?

A. That I don't know.

Q. Well, they know, - do you issue a certificate?

A. Yes.

Q. Are they issued a new certificate for a hundred shares?

A. New certificates are issued, yes.

Q. Now, how about an information sheet or an information form for tax purposes, would that be sent to the taxpayer, sir, or to the stockholder?

A. Well, there is something sent to the stockholder informing him what the percentage was and what he would be receiving.

Q. I see. Would it reflect income to him for tax purposes?

A. No.

Q. It wouldn't?

A. No.

MR. MURPHY: All right. Thank you. That is all.

MR. MELLENGER: Nothing further of this witness, your Honor.

THE COURT: Thank you, Mr. Meyers.

THE WITNESS: Thank you.

MR. MELLENGER: The Government calls Dennis Vassar.

* * * * * * * * *

DENNIS VASSAR (171 Bennett Street, Buffalo, New York), a witness called by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MELLENGER:

Q. Mr. Vassar, where are you employed?

A. Erie County Savings Bank.

Q. And what is your position there?

A. Assistant Treasurer.

Q. And pursuant to subpoena, did you furnish the United States Government with certain documents?

A. Yes, I did.

Q. I show you Government's Exhibits 62, 62-1 and 79 and ask you to look at those. Are those the documents which you furnished?

A. Yes, I did.

Q. And as Assistant Treasurer, are you custodian of these documents?

A. Yes.

Q. And are these documents made and maintained in the regular course of the bank's business?

A. Yes.

Q. I show you Government's Exhibit Number 62 and ask you to identify that.

A. It is an application for a time deposit account, also called a certificate of deposit.

Q. Okay, and who is that application made by?

A. Joseph Gay or Stella Gay.

Q. And what was the date of the application?

A. March 11, 1971.

Q. And what was the amount?

A. $10,000.

Q. Okay, and does that indicate the cancellation date of that certificate?

A. Yes.

Q. And when was that?

A. October 10, 1973.

Q. I call your attention to Government's Exhibit Number 62-1 and ask you to identify that.

A. It is a statement of interest earned on the account, the time deposit account.

Q. For what year?

A. 1971.

Q. And what is the amount of interest earned?

A. $498.56.

Q. Okay. Calling your attention to Government's Exhibit Number 62 again, that was opened on March 11, 1971?

A. Yes.

Q. Okay. Now, if that were opened by a deposit of a check, a treasury note or some sort of negotiable instrument, would the bank have a copy of that?

A. Yes, we would.

Q. Did you check to see whether there was any such instrument which opened that account?

A. Yes, we did.

Q. And what were you able to find?

A. We could not locate anything.

Q. And would you describe the steps you took to locate that for the jury, please?

A. We check through all the exchanges. Exchanges are checks. We checked through all the checks that were issued that day and we could find nothing in the name of Joseph Gay for March 11, 1971 and we also checked the previous day and the following day and could find nothing.

Q. How about for treasury notes?

A. The same with that.

Q. And Government's Exhibit Number 79?

A. The same with that, one of our bank drafts.

Q. And who is that to the order of?

A. Stella Gay and Joseph Gay.

Q. And who is the remitter of that draft?

A. Mr. and Mrs. T. Mazur.

Q. And in what amount is that draft?

A. $4,020.

Q. And the date of the draft?

A. May 24, 1971.

Q. What, if any, endorsements are on the reverse of that draft?

A. The endorsement of Stella Gay and Joseph Gay.

Q. And can you tell us from the notations on the reverse side what day that was cashed?

A. Yes, May 25, 1971.

MR. MELLENGER: I have no further questions, your Honor.

THE COURT: Mr. Murphy.

CROSS EXAMINATION BY MR. MURPHY:

Q. Yes, sir. Now, showing you Exhibit, - Government's Exhibit Number 79, that is a bank draft was purchased by Mr. and Mrs. Mazur, is that right?

A. Yes.

Q. Payable to Stella Gay and Joseph Gay, is that true?

A. Yes.

Q. May 4th of '71?

A. May 24, '71.

Q. I am sorry, May 24th. Now, does that show whether or not it was deposited anyplace, sir?

A. No, it doesn't.

Q. Well, does it show that another bank handled it?

A. Our exchange, our checks clear through Marine so once this check is cashed, it would go to Marine for clearing. You will find Marine Midland's cancellation stamp on the back.

Q. All right. Was it deposited in your bank?

A. From looking at the draft, we do not know if it were deposited or not.

Q. Well, did you check the records of your bank to see if you had any deposits in Mr. Gay's name?

A. Yes.

Q. And all you had was the $10,000 certificate, isn't that right?

A. Yes.

Q. All right. Now, what occurred then with this, do you know? Was that part of the $10,000 certificate?

A. No.

Q. It couldn't have been, isn't that true?

A. Right.

Q. All right, so then not having been deposited in your bank, it would appear that it was cashed, isn't that right?

A. Yes.

Q. And the cash taken?

A. Yes.

Q. All right. Now, Joseph Gay and Stella Gay, Exhibit 62, Government,- I am sorry. Did you offer these in evidence, Mr. Mellenger?

MR. MELLENGER: No, but I will do so at this time.

THE COURT: You do not object?

MR. MURPHY: No.

THE COURT: We will mark them in evidence when Mr. White returns.

(Government Exhibits Numbered 62, 62-1 and 79 received in evidence.)

BY MR. MURPHY:

Q. It is a non-negotiable certificate of deposit and when was the maturity date?

A. The maturity was March 11, 1973.

Q. And when was it closed?

A. October 10, 1973.

Q. Do you know how it was closed?

A. Yes.

Q. How?

A. Execution of a levy against the account.

Q. Execution of a levy against the account by whom?

MR. MELLENGER: Objection, your Honor.

MR. MURPHY: He went into how it was closed, your Honor.

MR. MELLENGER: The date of the closing is irrelevant. It is a 1973 closing date and the indictments only extend to 1971.

THE COURT: I will sustain the objection. Mr. Murphy, do you want to make a record?

MR. MURPHY: Yes.

(Side bar conference held between Court and counsel as follows:

MR. MURPHY: I submit, your Honor, on direct examination that the United States Attorney asked the witness when it was closed and the amount of money that was in it as of the closing date. It is in evidence.

THE COURT: Frankly, so what? It is after the date, right?

MR. MELLENGER: Yes, that's right, your Honor.

THE COURT: So what does it mean as far as any computation?

MR. MELLENGER: No computation whatever, your Honor.

THE COURT: Any reason we should get into all this, what happened afterwards?

MR. MURPHY: I don't know whether he is going to use it for computation.

(Side bar conference concluded.)

THE COURT: Ladies and gentlemen, we are concerned with what occurred during the indictment years. Sometimes in a tax case in order to get history, you have to find out what happened before the indictment years. We have already had some testimony about various mortgages and so forth but what happened afterwards unless there is something very unusual we would not hear about it and so we are not going to go into details of what happened after the indictment years as far as this account is concerned.

MR. MURPHY: Your Honor, may I have Defendant's Exhibit, - it would be 14, 15, 16 marked.

(Defendant's Exhibits Numbered 14, 15, 16 marked for identification.)

THE COURT: Just mark it in pencil and when Mr. White returns, we will make the list.

BY MR. MURPHY:

Q. I show you, sir, Defendant's Exhibit 14. Is that a copy, sir, of the Government Exhibit, a portion of Government Exhibit 62?

A. Yes, it is.

Q. All right. I show you Government's Exhibit, -

Defendant's Exhibit 15. Is that a copy, sir, of the guaranteed interest savings certificate?

A. Yes, it is.

Q. And I show you Government's Exhibit 16. Do you know an Edith H. Barowski?

A. Barowski?

Q. Barowski.

A. Yes, I do.

Q. By whom is she employed, sir?

A. Erie County Savings Bank.

Q. And in what capacity?

A. Savings servicer.

Q. Is that a receipt, sir, signed by Edith H. Barowski dated March 8, 1971?

A. Yes, it is.

Q. To Joseph Gay?

A. Yes, it is.

Q. Which states that a treasury bill for $10,000 to deposited in a certificate of deposit, is that correct?

A. Yes.

Q. And that is signed by her?

A. Yes.

Q. So that the bank prior to the issuance of the savings certificate did issue to Mr. Gay a receipt saying that a $10,000 treasury bill would be utilized for the purchase of a savings certificate, isn't that right?

A. Yes.

Q. And the only savings certificate that your records reflect is the one issued to Mr. Gay on March 11th of that year, isn't that true?

A. Yes.

MR. MURPHY: Thank you. That is all.

MR. MELLENGER: Nothing further, your Honor.

THE COURT: Thank you.

MR. MURPHY: For the record, your Honor, I would have no objection to the Government's Exhibits going into evidence. I would offer Defendant's Exhibit 14, 15 and 16 in evidence.

MR. MELLENGER: No objection, your Honor.

THE COURT: No objection. We will mark all the exhibits in evidence upon the return of Mr. White.

(Defendant's Exhibits Numbered 14, 15 and 16 received in evidence.)

MR. MURPHY: Your Honor, may we approach the bench?

THE COURT: Sure.

(Off the record side bar conference held between Court and counsel.)

THE COURT: Ladies and gentlemen, we will nqw be in recess for a few minutes and then return. You may walk out with the marshal. Remember my prior instructions to you. We will be in recess.

(Recess taken at 3:12 p.m.)

* * * * * * * * *

PROCEEDINGS: After recess, 3:25 p.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury present.)

THE COURT: Mr. Mellenger.

MR. MELLENGER: The Government calls Robert Clark.

ROBERT L. CLARK (50 Parkview Avenue, Lackawanna, New York), a witness called by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MELLENGER:

Q Mr. Clark, where are you employed?

A Marine Midland Bank.

Q And what is your position there?

A Assistant Security Officer.

Q And how long have you been so employed?

A In that particular position, five years. I have been with the bank thirty-five.

Q And pursuant to a subpoena, did you furnish the Government with certain records of your bank pertaining to Joseph and/or Stella Gay

A I did.

Q I show you Government's Exhibits 17, 18 - -

THE COURT: Thatis 17?

BY MR. MELLENGER:

Q Yes. 18, 19, 20, 20-1, 24, 25, and 26. Are those the records which you furnished pursuant to that subpoena?

A. They are.

Q And as assistant security officer, are you considered a custodian of those records?

A. I am not a custodian of the records. However, in my position, part of my job is to gather records for court appearances and Internal Revenue summons, any gathering of records for legal purposes and in that capacity, I have access to all bank records.

Q Are these records maintained and made by the bank in the ordinary course of business?

A. They are.

Q I call your attention to Government's Exhibit Number 17. What is that?

A. It is a signature card for the checking account of Gay Printing Company at our Clinton Office, Account Number 78170179-1 and ledger sheets pertaining to that account for the period from July 28, 1966 through January 25, 1972.

Q And those are microfilm copies, are they not?

A. Yes, they are.

Q. Did you make a search for the originals of those copies?

A. The originals, - by the way, the signature card is an original. The ledger sheets, the fact that they are on microfilm indicates that they have been, - the originals have been destroyed. While we keep ledger sheets for a ten year period of time after a certain period they are put on microfilm at which time the originals are destroyed. This is a matter of space and handling.

Q. Okay, so the microfilm copies would be the business records of the bank at this point, would they not?

MR. MELLENGER: Okay. Your Honor, I would like to move Government's Exhibits 17, 18, 19, 20, 20-1, 24, 25 and 26 into evidence at this time.

MR. MURPHY: Only with regard to relevancy, no objection.

THE COURT: All right. We will mark them in evidence.

(Government's Exhibits numbered 17, 18, 19, 20, 20-1, 24, 25 and 26 received in evidence.)

BY MR. MELLENGER:

Q At this time, Mr. Clark, I am showing you Government's Exhibit 18-1, 20-2, 21, 22 and 23 and I ask you what those are.

A 18-1 is a picture of a savings account signature card signed by Joseph Gay at our Clinton Street office, Number 781513600.

Q Are these photocopies of records kept by the bank in the ordinary course of business?

A Yes, they are.

Q These photocopies are not the bank's records, are they?

A No.

Q Now, did you, pursuant to an Internal Revenue Service summons, furnish these photocopies to anybody?

A These were supplied by us to the Internal Revenue on an Internal Revenue summons, yes.

MR. MELLENGER: Your Honor, I would like to move Government's Exhibits 18-1, 20-2, 21, 22 and 23 into evidence.

PRELIMINARY EXAMINATION BY MR. MURPHY:

Q I am sorry. These exhibits, you say they were supplied to you by the IRS?

A No, we supplied the IRS these records.

Q I see. Where would the originals be?

A. If I may check. Two of these, - this, these two, the originals have been destroyed in that the retention period on those particular records is seven years.

Q. You are talking about Government Exhibit 20-2 and Government Exhibit 21, is that right?

A. Right.

Q. Now, they are destroyed?

A. Yes. The retention schedule on deposit tickets is seven years.

Q. I see. Now, do you know when they were destroyed?

A. No, I don't.

Q. Obviously, after these pictures were taken, is that correct?

A. Yes. If I am not mistaken, the pictures were taken in '71 or '72. I am not sure just what date, but I know it was in the early 70's.

MR. MURPHY: I have no objection with regard to 20-2, - 20-1, except with regard to the relevancy, your Honor.

MR. MELLENGER: Excuse me, that is 21.

MR. MURPHY: I am sorry, 20-2 and 21.

THE COURT: As I understand it, Mr. White, we are going to mark in evidence Exhibits from 17 to 26.

MR. MELLENGER: With three exceptions so far, your Honor. 18-1 is not yet in evidence. 22 or 23 are not yet in evidence.

THE COURT: All right.

MR. MURPHY: May I just have a moment, your Honor. No objection, your Honor. Your Honor, rather than continue to make the objection with regard to relevancy, I assume that applies.

THE COURT: That is clearly understood, ladies and gentlemen. We have a lot of documents here and it may well be at the end that some of them, - maybe many of them are not relevant. We just have to wait until we can have some opportunity to interconnect one with another.

(Government Exhibits Numbered 18-1, 20-2, 21, 22, 23 received in evidence.)

DIRECT EXAMINATION BY MR. MELLENGER (Resumed):

Q You havepreviously stated, - would you identify Government's Exhibit Number 17, please?

A This is the checking account signature card in the account of Gay Printing Company at our Clinton Office, Account Number 781/0179-1. Ledger sheets relating to that account for the period from July 28, 1966 through January 1st, - or January 25th, rather, 1972.

Q That is inclusive of that period of all ledger sheets?

A. It is.

Q Would you identify Government's Exhibit Number 18, please?

A. This is an account history on a savings account at our Clinton Street office in the name of Joseph Gay.

THE COURT: Mr. Clark, perhaps the jury can hear you, but I want to be sure. Make sure you keep your voice up.

THE WITNESS: This is an account history sheet on a savings account in the name of Joseph Gay, Account Number 78151360-0.

BY MR. MELLENGER:

Q And for what periods?

A. This is from December 31, 1965 through February 1, 1968.

Q And what happened on February 1, 1968?

A. Then, at that time, the account closed.

Q I call your attention to Government Exhibit 18-1 and what is that?

A. This is a photocopy of a signature card relating to this savings account 78151360-0 in the name of Joseph

Gay.

Q That is a signature card for Government Exhibit 18, is it not?

A Right.

Q Government's Exhibit Number 19?

A Marine Midland Savings Certificate in the amount of $25,000 at our Clinton Office dated April 17, 1967 maturing in one year in the name of Joseph Gay or Stella Gay.

Q Okay. Does that indicate that it was ever redeemed?

A Yes, it does.

Q And when was that redeemed?

A April 17, 1968.

Q Okay, and what happened to the proceeds of that certificate?

A According to a notation on the back of the certificate, it was transferred to a gold Passbook Number 450691. The principal and the interest was also credited to the same account.

Q Is there a notation as to the interest?

A Yes.

Q How much interest was paid on that?

A Indication here is $1,273.64.

Q I call your attention to Government's Exhibit Number 20. What is that?

A This is a signature card for a Gold Passbook Account in the name of Joseph and Stella Gay, again at the Clinton Office, Account Number 781450691, and also ledger, a ledger sheet and account history from the time the account opened February 1, 1968 through December 31, 1971.

Q Would you identify Government's Exhibit Number 20-1, please. What is that?

A These are two savings account deposit slips, one dated July 3, 1970 in the amount of $1,000 to account Number 781450691 in the name of Joseph and Stella Gay.

Q Does that indicate whether that deposit was cash, check or some other form?

A Yes. It indicates it was cash. The other deposit ticket dated March 1, 1971, name of Joseph Gay in the amount of $3,260, deposited to Account Number 781450691.

Q And what was the makeup of that deposit?

A The notation on the deposit ticket indicates it was coupons.

Q Would you identify Government's Exhibit Number 20-2, please?

A A photocopy of deposit ticket to the savings account of Joseph and Stella Gay in the amount of $3,000, Account Number 781450691.

Q And what was the date of that deposit?

A The date was April 4, 1968.

Q And what was the makeup of that deposit?

A The indication here is it was cash.

Q I call your attention to Government's Exhibit Number 21. Would you identify that, please?

A This is a deposit ticket. I don't see any date on here; Joseph or Stella Gay $25,000, account Number 781450691. No indication of a date.

Q I call your attention to Government's Exhibit 22. Would you identify that, please?

A Savings account withdrawal slip on the Account Number 781450691 in the amount of $40,000, signed by Joseph Gay.

Q Governments Exhibit Number 23.

A A savings withdrawal slip on Account Number 450691 dated October 9, 1970 in the amount of $10,871.02, signed Joseph Gay.

Q Exhibit Number 24.

A It is a general books credit to the hold-over account at our Clinton Office in the amount of $98,871.02.

Q What is a hold-over account?

A A hold-over account is a general book account that the bank uses to segregate or hold funds for brief periods of time, funds that normally could not go into another account, but are set aside for a specific purpose.

Q What is the notation on that credit slip?

A The credit notation here is Joseph Gay, payment for municipal bonds, charged to account from Municipal Securities Department.

Q And what was the date of that?

A It was dated October 9, 1970.

Q There is also a debit slip there, is there not?

A Yes. There is a debit to the general books hold-over account dated October 26, 1970 in the amount of $47,866.08.

Q What is the notation on that slip?

A The notation on this is charge for J. Gay purchase of Municipal Securities from 21270.

Q Do you know what 21270 is, by any chance?

A No, I do not.

Q Exhibit Number 25.

A This is a deposit to regular, - no, wait a minute. No. This is a deposit to a savings account 781450691 in the amount of $3,241.92 on September 4, 1970.

Q At the top of that, it says, printed on the top of that slip is "Regular Checking", and why do you say it is a deposit to a savings account?

A Because of the account number. Quite frequently, people pick up the wrong deposit slip and the thing which governs the number at the bottom which is magnetically encoded so it goes into that account and 450691 is a savings account number.

Q Finally, Government's Exhibit Number 26.

A. This is a savings account deposit to Account 781450691 dated January 4, 1971 in the amount of $1,587.50.

MR. MELLENGER: I have no further questions, your Honor.

CROSS EXAMINATION BY MR. MURPHY:

Q Mr. Clark, would you pull the exhibit which you say was a deposit to a savings account, although it was listed as a checking account?

A. Exhibit 25, yes.

Q Yes, and what is the date of that exhibit?

A. September 4, 1970.

Q September 4th?

A. Yes.

Q And what is the amount?

A. $3,241.92.

Q Now, sir, we have been dealing, primarily, with, have we not, in your exhibits, Savings Account 78151360-0, isn't that correct?

A. No. I believe - -

Q Well, that is one of them, isn't it?

A. That is one of them, yes. Most of them are in the other one.

Q That is one of them, is it not?

A. That is one of them, yes.

Q And also 78145069-1, isn't that true?

A. Correct.

Q Now, calling your attention to the penciled notation, I show you Defendant's Exhibit 17 for identification and ask you, sir, if you can identify that?

A. Yes. This is Savings Passbook in the name of Joseph Gay, Account Number 78151360-0 at our Clinton Office.

Q That book would show all of the transactions which you have testified to regarding deposits, withdrawals and close-outs, isn't that true?

A. Yes.

Q All right. Now I show you Defendant's Exhibit 18 for identification and ask you if you can identify that, sir?

A. Yes. This is a Gold Passbook Account, Passbook, name of Joseph and Stella Gay, Account Number 781450691 at our Clinton Office.

Q And that again would show all of the deposits and withdrawals that you have testified to and that your records reflect with regard to that account number, isn't that right?

A. Yes.

Q Now, of course, this $97,000 credit wouldn't be reflected in that book, would it?

A. No.

Q Now, as I understand this $97,000 credit, it was held for the purpose of purchasing Municipal Bonds through one of the Marine Trust Company trust organizations, isn't that right?

A. Well, Municipal Securities Department, yes.

Q Yes, the Municipal Securities Department, and what do they sell?

A. Well, all forms of Government and Municipal Bonds.

Q These would be the tax-free bonds?

A. I am assuming so, yes.

Q All right. April 17th, '70, - I am sorry, April 1, 1970 there were, - there was a withdrawal of $40,000 from Mr. Gay's account, Joseph Gay and Stella Gay, isn't that right?

A. Yes.

MR. MELLENGER: I object to that, your Honor, unless that savings book is in evidence.

BY MR. MURPHY:

Q Didn't you already testify from the records now in evidence that such a withdrawal was made?

THE COURT: Is that the only reason, Mr. Mellenger?

MR. MELLENGER: Yes, unless he is going to enter that in evidence.

THE COURT: Please?

MR. MELLENGER: It hasn't been entered in evidence.

THE COURT: Is that the only reason?

MR. MELLENGER: Yes, your Honor.

THE COURT: Then I will overrule the objection.

BY MR. MURPHY:

Q Is that correct, sir?

A Yes, it is.

Q Now, again on October 9, 1970, there was a $10,871.02 withdrawal from the Gold Book Account which is Defendant's Exhibit 18 for identification.

A That's right.

Q All right. I will offer 17 and 18 in evidence.

MR. MELLENGER: No objection, your Honor.

THE COURT: Mark them in evidence.

(Defendant's Exhibits Numbered 17 and 18 received in evidence.)

BY MR. MURPHY:

Q Mr. Clark, the interest that is earned on the savings account by a depositor, does the bank, at the end of the year, prepare an information slip for the depositor and for the Internal Revenue Service?

A. Yes, it does.

Q. And it mails the original to the IRS and the duplicate to the taxpayer for tax purposes, isn't that right?

A. Right.

MR. MURPHY: Thank you. That's all.

THE COURT: Anything else, Mr. Mellenger?

MR. MELLENGER: Nothing further of this witness, your Honor.

THE COURT: Thank you, Mr. Clark.

MR. MELLENGER: The Government calls Glenn Roll.

* * * * * * *

GLENN ROLL (17 Cayuga Avenue, Lancaster, New York), a witness called by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MELLENGER:

Q. Mr. Roll, where are you employed?

A. By the Marine Midland Bank, of Buffalo, New York.

Q. Any particular division?

A. The Municipal Securities Division.

Q. And what is your position there?

A. I am manager of operations.

Q. And did you, pursuant to a subpoena, furnish Government Agents with certain records of your division?

A. Yes, I did.

Q. Calling your attention to Government Exhibits 63, 63-1, 64, 65, 66, 67 and 68, would you look at those, please? Are those the records you furnished pursuant to that subpoena?

A. Yes, they are.

THE COURT: Mr. Roll, keep your voice up, please, so the jury can hear.

THE WITNESS: Okay.

BY MR. MELLENGER:

Q. And are you the custodian of those records?

A. Yes, I am.

Q. And are those records made and maintained in the ordinary course of business?

A. Yes, they are.

Q. Calling your attention to Government's Exhibit Number 63, would you identify that, please?

A. This is the account ledger that we maintain for our customer Mr. Joseph Gay. It shows the purchases and/or sales made with this customer.

Q. Okay. Does that show the purchases and sales or sales for a specific time period?

A. Yes, it does.

Q. And what time period is that?

A. From February, 1970 through October, 1970.

Q. Okay, and how many purchases does that show?

A. It shows five purchases.

Q. And how many sales?

A. No sales.

Q. Calling your attention to Government's Exhibit Number 63-1, what is that?

A. This is also the account ledger for Mr. Joseph Gay, showing again, - showing purchases for our customer.

Q. Okay, and for what period is that?

A. That is from the period December '72 through March, '74.

Q. Okay, and is Exhibit 63 related to 63-1 at all?

A. Yes, it is.

Q. It was all one card at one point, was it not?

A. That is correct.

Q. Now it is cut in half, is that correct?

A. Yes.

Q. And do you know who cut that in half?

A. Yes.

Q. Who did?

A. I did.

Q. For what purpose?

A. For the purpose of serving or complying with the first summons that I received asking for information for a time period through 1971 for our customer.

Q. That was a subpoena, was it not?

A. That was a, - yes, it was.

Q. Okay, and that subpoena information for 1967 inclusive through 1971, did it not?

A. That is correct.

Q. And this is what you supplied pursuant to that subpoena, did you not?

A. Yes, I did.

Q. And Government Exhibit Number 64?

A. This is a confirmation, our confirmation and securities receipt concerning our sale of securities to Mr. Joseph Gay.

Q. Okay, and what information does that confirmation show?

A. It shows that we sold to Mr. Gay eighty thousand Federal intermediate credit bank debentures 8.15% that matured March 1, 1973.

Q. Basically, the confirmation shows what was sold, when delivered and the price, does it not?

A. That is correct.

Q. And you have had a chance to look at 64, 65, 66, 67 and 68 prior to coming in here, did you not?

A. Yes, I did.

Q Okay. You have previously stated that Government's Exhibit Number 63 shows all purchases and sales for Mr. Gay for 1967 through 1971, have you not?

A That is correct.

Q Okay. Would you read off the transactions which Mr. Gay had during that time period and the date and whether it was a purchase or a sale?

A On February 25, 1970, Mr. Gay purchased eighty thousand Federal intermediate credit banks, 8.15% due 3-1-73.

Q And Government's Exhibit Number 64 is the confirmation of that purchase, is it not?

A That is correct.

Q And how much did he pay for that?

A $80,525.22.

Q Okay, and what is the next transaction on that ledger card?

A On October 5, 1970, Mr. Gay purchased twenty-five thousand New York City, New York 6.70% due 1-1-80.

Q And Government's Exhibit Number 65 is the confirmation of that purchase, is it not?

A Yes, it is.

Q And how much did he pay for those bonds?

A $25,813.83.

Q And what was the next transaction?

A On October 5, 1970, Mr. Gay purchased twenty-five thousand New York City, New York five and a half per cent that matured September 15, 1973.

Q Government's Exhibit Number 66 is the confirmation for that purchase, is it not?

A. Yes, it is.

Q And how much did he pay for that issue?

A. $25,272.94.

Q And what is the next transaction?

A. On October 5, 1970, Mr. Gay purchased twenty-five thousand New York City, New York six per cent, maturing January 1, 1973.

Q And Government's Exhibit 67 is the confirmation for that purchase, is it not?

A. Yes, it is.

Q And how much did he pay for that purchase?

A. $25,732, and no pennies.

Q And finally, what is the last transaction on that ledger card?

A. On October 5, 1970, Mr. Gay purchased twenty-five thousand Albany County, South Malls, 3.75 per cent. The bonds matured 4-1-77.

Q And Government's Exhibit 68 is the confirmation for that purchase, is it not?

A. Yes, it is.

Q And how much did he pay for those bonds?

A. $22,052.25

Q. Were these coupon bonds?

A. Yes, they are.

Q. And basically, what is a coupon bond?

A. A negotiable bond that bears, - has attached interest coupons. This is how the investor realizes his interest on the bonds.

Q. Okay, and when that coupon matures and it is clipped, is that a negotiable or non-negotiable instrument?

A. It is a negotiable instrument.

Q. It would be similar to a check, would it not?

A. That is correct.

Q. Now, have you made a determination as to when the coupons on these bonds, which you have just described, would mature?

A. Yes, I did.

Q. And what are the maturity dates?

A. I don't recall exactly as of this present time.

Q. And have you ever made a determination as to the amount of interest which would be redeemable when those coupons matured?

A. Yes, I did.

Q. And what are those amounts?

A. Here again, I don't know at this point in time.

Q. Okay. Did you ever reduce this information to a

written or a signed statement?

A. Yes, I did.

Q. Is that information in the form of a letter?

A. Yes, it is.

Q. Did you sign that letter?

A. Yes, I did.

Q. And was the information contained therein correct when you signed it?

A. Yes, sir.

Q. I am showing you now what has been marked as Government Exhibit 69 for identification. Is that the letter wherein you set forth that information?

A. Yes, it is.

MR. MELLENGER: Your Honor, at this time, I would like to move Government's Exhibits 63, 64, 65, 66, 67 and 68 and also 69 into evidence, without moving 63-1 into evidence.

THE COURT: Mr. Murphy.

MR. MURPHY: May I see the letter, please?

MR. MELLENGER: Sure.

THE COURT: What number is the letter?

MR. MELLENGER: 69, your Honor.

MR. MURPHY: 69.

THE COURT: 69.

MR. MURPHY: I have no objection, your Honor.

THE COURT: Mark them in evidence.

(Government Exhibits Numbered 64, 65, 66, 67, 68 and 69 received in evidence.)

THE COURT: Is there another one?

(Government's Exhibit Number 63 received in evidence.)

BY MR. MELLENGER:

Q Mr. Roll, would you read that letter marked Government's Exhibit 69 in evidence?

A This letter is dated March 21, 1973, addressed to the Chief, Intelligence Division, Post Office Box 268, Niagara Square Station in Buffalo, New York 14203, Re: Joseph Gay, 3 Fredro Street, Buffalo, New York. Gentlemen, in reply to your summons dated March 21, 1973, concerning security transactions for the account of Joseph Gay, the following list will detail the interest coupons on his purchases. Number one, eighty thousand Federal Intermediate Credit Bank, 8.15% dated 3-2-70, due 3-1-73. Purchase date 4-1-70. First coupon was payable 9-1-70 at $3241.89. Thereafter, each coupon was $3,260 on 3-1-71, 9-1-71, 3-1-72, 9-1-72 and 3-1-73.

"Number two, twenty-five thousand Albany County New York, South Mall 3.75% due 4-1-77. Purchase date 10-13-70. First coupon was payable 4-1-71 for $468.75 and the same amount was payable every six months thereafter until 10-1-72 and this same amount will be payable beginning on 4-1-73 and continuing every six months until 4-1-77.

"Number three, twenty-five thousand New York City, New York 6%, due 1-1-73. Purchase date 10-13-70. First coupon was payable 1-1-71 for $750 and the same amount was payable every six months thereafter until 1-1-73.

"Number four, twenty-five thousand New York City, New York 6.70% due 1-1-80. Purchase date 10-13-70. First coupon was payable 1-1-71 for $837.50 and this same amount was payable every six months thereafter until 1-1-73 and this same amount will be payable beginning on 7-1-73 and continuing every six months until January 1, 1980.

"Number five, twenty-five thousand New York City, New York five and a half per cent, due 9-15-73. Purchase date 10-13-70. First coupon was payable 3-15-71 for $687.50, and this same amount was payable every six months thereafter until 3-15-73 and the same amount will be payable on 9-15-73.

"All of these transactions assume that Mr. Gay did not sell these securities after he purchased them from us. If you have any questions relative to the above, please feel free to call.

"Very truly yours, Glenn E. Roll, Assistant Manager, Operations."

MR. MELLENGER: Thank you, Mr. Roll. I have no further questions.

CROSS EXAMINATION BY MR. MURPHY:

Q Would it be fair to say then, Mr. Roll, that your letter summarizes Mr. Gay's purchases and the interest that he would earn in the Municipals that he bought, is that correct?

A That is correct.

Q All right. Now, sir, Municipals, are you familiar with the tax consequences for the interest that was payable on these particular bonds?

A Yes, I am.

Q And I understand that with regard to the Albany bonds there is a question on the Federal?

A Not to my knowledge.

Q Well, are they all tax-free then?

A All Municipal bonds are tax-free.

Q All the interest on the Municipals would be tax-free?

A The interest on the Municipal bonds are tax-free, that is correct.

Q How about the Federal?

A They have a different tax status.

Q And what would that tax status on the Federals be?

A The Federal Intermediate Credit Bank debentures, the interest is taxable for Federal. State, tax-free.

Q Tax-free for state, but taxable for the Federal?

A That is correct.

Q All right. Now, the dates are, - say, the purchase of April 5th, - I am sorry, October 5th of '70, is that one of the dates that you mentioned, April 1st of '70 and then October 5th of '70?

A April 1st and October 5th? I am sorry. Would you rephrase that?

Q Yes. The purchases that were made on February 25 of '70, is that right?

A That is one purchase, correct, sir.

Q Now, does that mean that the payment is made that day?

A No, that does not mean a payment is made that day. That is the day the transaction takes place between the purchaser and the bank.

Q I see, so he would then come to the bank and say, "All right, I want to buy this amount of money". Could it be, sir, that the payment would have been made on April 1st of '70?

A. Normally, the settlement date is five business days after the transaction date.

Q. Yes, so we have 2-25?

A. Right.

Q. And it could have been April 1st that it was paid, is that correct? I mean - -

A. Normally, it is one business week after the transaction date.

Q. Now then, we have 10-5?

A. Right.

Q. Which would be October 5th of '70?

A. Right.

Q. And payment could have been made on October 9th, is that correct?

A. That could be correct.

Q. All right. In other words, when you say it is purchased on 2-25-70, that doesn't mean that Mr. Gay walked in and gave you all that money on the 25th, isn't that true?

A. That is correct.

Q. All right. Would you have a record as to when he did, in fact, pay you, sir?

A. Yes, I would. It shows on those five exhibits.

Q. All right. Could you then, - for the February 25th purchase, could you tell me the date that that was paid, sir?

A. The date that that was paid was April 1, 1970.

Q. All right, and how about the October 5th transactions?

A. These were, - these were four transactions for $25,000 each. Two were paid on October 13th, one paid on October 15th and the last one was paid on October 19th.

Q. All right. Now I want to show you Government's Exhibit 24 in evidence, sir, and ask you if you are familiar with that particular exhibit?

A. No I am not.

Q. All right. Well, can you tell me, sir, whether or not there was a charge, - you work for Marine Midland, do you not?

A. I do.

Q. And can you tell me whether or not, - what a charge for hold-overs, - do you know what that is?

A. I am familiar with a charge to a hold-over account in the banking business, yes, I am. I am not familiar with this particular debit, this charge. It is not our department.

Q. In any event, on 10-9 - -

A. Yes.

Q. Which would be October 9th?

A. Right.

Q. Mr. Gay had $98,000 payment for Municipal bonds, charge to come from - -

A. Municipal Securities.

Q. The Municipal Securities Department?

A. Right.

Q. Is that your department?

A. That is correct, sir.

Q. All right, and then there is at least one debit on 10-26 which takes forty-seven thousand eight sixty-six o eight from this credit, is that true?

A. That is true.

Q. All right. Would it be fair to say then that this $98,000 was applied to the purchase of the April transactions that you testified to?

A. Of the October transactions, you mean?

Q. I'm sorry, yes, the October.

A. I would say yes.

MR. MURPHY: Thank you, sir. That is all.

THE COURT: Anything else, Mr. Mellenger?

MR. MELLENGER: If I may have just one minute, your Honor. Nothing further of this witness, your Honor.

THE COURT: All right. Thank you, Mr. Roll.
Next witness, please.

MR. MELLENGER: The Government calls Mr. Raymond
Stevenson.

* * * * * * * * * *

RAYMOND E. STEVENSON (221 Sterling Avenue, Buffalo, New York), a witness called by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MELLENGER:

Q Mr. Stevenson, what do you do for a living?

A. I am a stockbroker.

Q How long have you been a stockbroker?

A. Over fifteen years.

Q Did you ever handle any transactions for a Joseph or Stella Gay?

A. Yes.

Q And pursuant to a subpoena, did you furnish the Government with certain records pertaining to those transactions?

A. Yes.

Q Showing you Government's Exhibits 70, 71 and 72, would you look at those, please?

A. Yes.

Q. And would you identify those?

A. These are account cards that I use in my day-to-day transactions with my clients.

MR. MURPHY: I am sorry. Could you speak up, please?

THE WITNESS: These are account cards that I use in my day-to-day transactions with my clients putting in the buys and the sells.

BY MR. MELLENGER:

Q. Who are those cards for?

A. Joseph Gay, Stella Gay, Joseph J. Gay and/or Stella Gay.

Q. And who keeps those account cards?

A. I do.

Q. And is the information contained therein, does it reflect transactions that actually occurred?

A. Yes.

Q. Calling your attention to Government's Exhibit Number 70, I ask you to take a look at the reverse side of this exhibit. First of all, who is this account card for?

A. Joseph J. Gay.

Q Okay, and have you recorded on there the transactions which you have handled for Mr. Gay?

A Yes.

Q And what transactions have you handled for Mr. Gay?

A 2-6-69, a hundred shares of General Motors at eighty.

Q That is $80?

A That is $80. That would be $8,000. Do you want me to read all of these?

Q Yes, would you, please?

A Dreyfuss, bought 1-25-63, 492.555 shares at $18.67, approximately $10,000. Niagara Mohawk, a hundred shares on 8-3-66, 100 shares at twenty-one and an eighth, approximately $2,100. 8-31-66, a hundred shares of Niagara Mohawk, twenty-one and a quarter, approximately twenty-one twenty-five. A hundred shares of U. S. Steel on 8-31-66 at forty, approximately $4,000. 100 shares Niagara Mohawk, 3-18-69 at twenty and three quarters, approximately $2,100, and I sold an Allied Aero Industries, 200 shares on 6-4-69 at five and seven eighths, approximately $1,200, and on 8-4-69, he bought 500 Niagara Mohawk at eighteen and a quarter, approximately, - five is twenty, - twenty-five, - about $9,000. 200 shares of Phillips Petroleum, bought on 8-4-69 at twenty-seven and seven eighths, approximately $6,000, and on 3-3-71 he bought 10,000 of Fruehauf Finance, seven halves of seventy-eight, for 99.74, approximately a shade under $10,000.

Q I call your attention to the notations on the top of that card. What are those?

A. I got this marked in pencil. It says Stella Gay, a stock that General Motors, - we bought on 6-1-66, a hundred shares at eighty and a quarter, approximately $8,[illegible]. On 8-3-66, we bought a hundred shares of Telephone at fifty-one and three eighths, approximately $5,100, and on 8-31-66, two hundred shares of Niagara shares, about $4,100.

Q I call your attention to Government's Exhibit Number 71 and ask you to identify that?

A. This is Stella Gay, account card.

Q Okay. What purchases and sales does that card reflect?

A. One hundred shares of Niagara Mohawk was purchased on 3-18-69 at twenty and seven eighths, approximately $2,100. One hundred shares of Phillips Petroleum was purchased 4-16-69 for seventy-one and five eighths, approximately $7,150, and 8-4-69, two hundred shares of Phillips Petroleum was purchased at twenty-seven and seven eighths, which would be six times eight, about $5,600 and five hundred shares of Niagara Mohawk was purchased on 8-4-69 at eighteen and a quarter which would be, let's see, five would be twenty, would be ten, would be about $8,500, and on three - -

THE COURT: Mr. Stevenson, can you keep your voice up, please?

THE WITNESS: Yes. Let me get up a little closer here. On 3-3-71, 10,000 face of Fruehauf Finance, seven halves of seventy-eight was purchased at 99.74, approximately $10,000.

BY MR. MELLENGER:

Q And calling your attention to Government's Exhibit Number 72, do you recognize that?

A Yes. This is Joseph J. Gay and/or Stella Gay. On 5-8-1970 bought $10,000 at face of General Acceptance Corporation senior debentures due April, '90, 1990, at par which is $10,000 and on 5-15-70, we bought 400 Niagara Mohawk at fifteen and three quarters which approximately is five is sixteen, four, let's see, sixteen, thirty-two, about $7,500.

Q And how long have you handled transactions for Mr. and Mrs. Gay, approximately?

A Oh, about thirteen years.

Q And that would include all the transactions between January 1, 1967 and December 31, 1971?

A Yes.

MR. MELLENGER: Thank you. I have no further questions.

CROSS EXAMINATION BY MR. MURPHY:

Q Mr. Stevenson, were there any sales of any of these stocks?

A Just the one I had recorded there that I had made note of. That is the only one I have on my books.

Q I am sorry. Would you - -

A Just this one here, Allied. Let's see, who is this for. This is for Joe J. We sold 6-4-69 two hundred shares of Allied Aero Industries at five and seven eighths. That is the only sell I have recorded.

Q Well, did you buy any for him of that stock?

A No.

Q Well, did he bring in a stock certificate?

A He must have.

Q For how many shares?

A For two hundred shares.

Q Of Allied Industries?

A Yes.

Q And you sold that for him and what did you sell it for?

A What is it, five and seven eighths, two hundred shares at five and seven eighths.

Q Which would amount to approximately what?

A Six, twelve, - $1,200.

Q About $1,200. Now, over the years, - incidentally, when you have this penciled notation on top, does that correspond with Stella Gay's card?

A Well, no, not in this case. I don't recall why I did that. What I did, I originally worked with Hugh Johnson and we transferred over to Loeb, Rhoades and just to have records of what was transpiring so I knew what the account had, why, I just made a pencil notation.

Q I see.

A This is only for my own records.

Q This is only for your own reference?

A Yes.

Q As I understand it, he first came to you in what year, '62?

A In 1963.

Q All right, and you were with Hugh Johnson then?

A Yes.

Q And is it possible, sir, that you had purchased stock, this Allied Stock for him back then?

A Possibly, but I would have had a, - there is a possibility, yes. I don't have those records so I don't recall.

Q All right. Now, you have, - you see, these arenot official records then, these are only for your own information?

A. That's correct.

Q. All right, and whether or not these carry-overs for Stella Gay from the previous brokerage firm that you worked for, you don't know, is that it?

A. I don't know exactly a dollar amount, though.

Q. Well, what I am getting at, let's take for example Government's Exhibit 70. When was the purchase made? This is for Stella Gay, is that correct? When was the first purchase made as shown by this card?

A. 3-18-69.

Q. Now, where were you working then?

A. In '69, I was at Loeb Rhoades.

Q. Well then, let's go to Joseph Gay's account. When was the first purchase made for Mr. Gay?

A. The very first that I have a record of is here in '63, 1-25-63, purchased four hundred and some odd shares of Dreyfus.

Q. Now, that is the second entry, isn't it?

A. Yes.

Q. All right. What is the first entry?

A. 100 shares of General Motors purchased 2-69.

Q. You then made an entry that occurred in 1969 and then below that made an entry that occurred in 1963?

A Correct.

Q And then the next record would be for what year?

A '66.

Q '66. Well, let's go down to the bottom record then.

A '71.

Q So then would it be fair to say that these are not recorded as they transpired?

A In that particular case, that would be fair to say.

Q Well then, you have had to, somehow, make a summary, isn't that true?

A No.

Q All right. Now, let's just take the exhibit. I am sorry, sir. You take the exhibit. I assume you are offering these in evidence?

MR. MELLENGER: Yes.

BY MR. MURPHY:

Q I have no objection, your Honor. You take the exhibit now in evidence and on the back of the sheet, we have a line, is that true?

A Yes.

Q Now, you say GM 2-69, 100 shares at eighty?

A Yes.

Q All right. Now, that is the first line at the top of the sheet, isn't it?

A Yes.

Q All right. Now, where did you get that information from?

A From the trade, from the day the trade was made I had inserted that in there.

Q All right. That is the day it was made?

A Yes.

Q All right. Now, the second line we go to is Dreyfus, 1963, is that right?

A Yes.

Q Now, was that made the day of the trade?

A They were all carried over from another journal.

Q That is what I am asking you, sir. Isn't it a fact that you made a summary of some other account?

A Yes, because this is a new account card. The cards were changed and then I took them off of some other records that I had.

Q Other records that you had?

A Yes.

Q That is what I am saying; it is a summary that you made of some other records, isn't that true?

A Yes.

Q Now, was that from the previous brokerage firm or the firm you are with now?

A Previous.

Q Previous. All right. Now, these notations up on top, were they also taken from some previous firm's records?

A. They must have been, yes.

Q. Well, you feel that they must have been?

A. Yes.

Q. Then we go over and there are some records up here on the front side?

A. Yes.

Q. Were they also taken from some previous firm's account?

A. No.

Q. What are they taken from?

A. Those are marks that I made on that card when I was contacted.

Q. Oh, by the Government?

A. By the Government.

Q. All right. Now, going to Stella Gay, do the recordings made on the back of Government Exhibit - -

A. 71.

Q. 71, did they reflect the exhibits, the recordings made on the back of 70 at the top?

A. I don't know. No, no, they don't. Those are additional, obviously. I don't have them duplicated, no.

Q. Well, see, were these made in, - while you were with the firm that you are presently with?

A. Yes.

Q All right. Were these transactions made while you were with the previous firm?

A. Yes, they had, yes.

Q So that when you recorded Mr. Gay's, you recorded Mrs. Gay's on top and then when you made out a card for her, you didn't transfer it, is that right?

A. That's correct.

Q And then you made a card out for the two of them, isn't that true?

A. Yes.

Q And I assume that they were recorded as of the day that the transaction was made?

A. Yes.

Q Can you tell me, sir, did Mr. Gay buy on margin or cash?

A. Cash.

Q When you say "cash", do you necessarily mean that he walked into your office with folding money, U.S. currency?

A. No.

Q All right. What do you mean by that?

A. That means that the trade is made and in five business days that the trade is paid for. It is not margin at all. There is no margin agreement, no prior paper signed of margin arrangement with the brokerage firm that we would pay for half the stock and he would pay the other half. This was all done on a cash basis and that is what a cash account is.

Q And he has always had a cash account and has not used the margin, is that right?

A. To the best of my knowledge, yes.

Q All right. Now, do you specifically recall the payment for any of these transactions, sir?

A. No, I can't really.

Q I mean, does he pay you or does he go in, - if he doesn't have his money the day that the transaction is made with you, does he, - when he does bring the money in or the payment in, does he have to come to you or does he go to a cashier?

A. He goes to a cashier and hands a check in. We very seldom see the actual dollars if it is cash or check. There is no way I could differentiate between them.

Q So you don't know whether these were paid by check, bank draft, money order - -

A. That's right.

Q Or actual currency, is that right?

A. That's right.

MR. MURPHY: Thank you, that is all.

THE COURT: Nothing further?

MR. MELLENGER: Nothing further.

Admonition to the Jury.

THE COURT: All right. Thank you, Mr. Stevenson. Ladies and gentlemen, we will be in recess until Tuesday. We will not be in session on Monday. Next Tuesday, and we will try to meet and begin at 9:30. Next week we will be in session for two days only. I cannot be here on Thursday and Friday so we will be here next week on Tuesday and Wednesday. Come next week at 9:30. In the intervening time, do not talk about this case, do not discuss it. Make no special study of tax laws, securities, transactions, banking, anything that might apply, but if you desire to file your own tax return, certainly, you can do that.

I hope you all have a very pleasant weekend. You may go out with the Marshal.

(Jury escorted from the courtroom.)

(Government's Exhibits Numbered 70, 71, 72 received in evidence.)

(Government's Exhibits Numbered 96-3 through 96-14, respectively and inclusive, were received in evidence.)

THE COURT: We will be in recess.

(Recess taken at 4:44 p.m.)

* * * * * * * * * * * *

Transcript of Proceedings, March 30, 1976.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

* *

THE UNITED STATES

-v-

JOSEPH V. GAY,

Defendant.

CRIMINAL DOCKET
NO. 1974-143

* *

Proceedings of trial held before the HON. JOHN T. CURTIN, and a Jury, in Part I, United States Court House, Buffalo, New York, resuming on March 30, 1976.

APPEARANCES:

RICHARD J. ARCARA, United States Attorney
by RICHARD MELLENGER, Assistant United
States Attorney,

ROBERT M. MURPHY, Esq., Attorney for
the Defendant.

* * * * * *

PROCEEDINGS: March 30, 1976, 10:00 a.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury not present.)

(Government Exhibits Numbered 150, 151, 152, 153, 154 marked for identification.)

THE COURT: The starting time here is 9:30. Mr. Mellenger, you have all your equipment up here at 9:15 whether I have meetings or not.

MR. MELLENGER: Yes, your Honor.

THE COURT: It does not matter. Counsel, litigants, witnesses, everyone is to be ready at 9:30.

MR. MELLENGER: Yes, your Honor.

THE COURT: If we go over with a meeting, just stand by. Mr. Knisley, Mr. White, myself, all our notes indicate the beginning time this morning at 9:30.

MR. MURPHY: I apologize, your Honor. It was an oversight.

THE COURT: I know in the other courts they start at 10:00, but just the way things break here, it would be better if we get a little earlier start.

MR. MURPHY: Thank you, your Honor.

(Jury returns to the courtroom.)

THE COURT: Ladies and gentlemen, good morning. Mr. Mellenger, are you ready?

MR. MELLENGER: Yes, your Honor.

THE COURT: Call your next witness, please.

MR. MELLENGER: Anthony Vitanza.

* * * * *

ANTHONY VITANZA (1321 Kenmore Avenue, Buffalo, New York), a witness called by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MELLENGER:

Q. Mr. Vitanza, where are you employed?

A. Shields, Modell, Rolland, Incorporated.

Q. And what is your position there?

A. I am Vice-President in charge of sales.

Q. And at one time was that Shields & Company?

A. Yes, sir.

Q. As Vice-President of your firm, did you furnish the Government with certain records pertaining to a Joseph or Stella Gay pursuant to subpoena?

A. Yes, sir.

Q. I am showing you what has been marked as Government's Exhibit 73 and 74 and ask you to look at those. Are those the records which you furnished?

A. Yes, they are.

Q. And do you have custody of those records as Vice-President?

A. We do, - I do.

Q. And are those records made and maintained in the regular course of business of your firm?

A. They are.

Q. I notice those are microfilm copies.

A. That's true.

Q. Are the originals of those available?

A. No.

Q. What is the retention policy of your company as to the originals of those?

A. The originals are sent to the customer. The duplicate original is kept in our office for three years which is a local office and the hard copy is kept in our New York office for ten years and the microfilm is the permanent record.

Q. So the microfilm copies would be the business records of your firm, is that correct?

A. Yes, sir.

Q. I call your attention to Government Exhibit Number 73. What is that?

A. This is the statements for Joseph J. Gay, 3 Fredro Street, Buffalo, New York.

Q. And what time periods do those statements cover?

A. From 1-27-66 to 3-31-68.

Q. And what information is contained in those statements?

A. The purchase and sale of securities, any dividends or stock dividends, - dividends or checks that might be sent out to the customer and the day they transpire.

Q. Now, beginning with January 1, 1967, what transactions do those statements reflect?

A. January of 1967 our record shows that there was one hundred shares of International Life Insurance of Buffalo in the account, street name.

Q. Would that have been purchased prior to the beginning of 1967?

A. Yes, sir.

Q. Okay.

A. In May of 1967 there was a ten per cent stock dividend for International Life Insurance Company which now gave the position at the end of May of 110 shares held in the account for the customer. November, 1967 there was a purchase of 200 shares of Niagara Mohawk Power at 20 and an eighth for total moneys of $4,079.26. On November 16th we received a check in the amount of $4,079.26 and November 17th 110 International Insurance Company stock was delivered to the customer in the customer's name and also the 200 shares of Niagara Mohawk Power were delivered to the customer in the customer's name.

Q. The International Life Insurance which was delivered on November 19th 1967, was that a purchase on that date?

A. No, it wasn't.

Q. Was that the stock held in the street name?

A. Yes, sir.

Q. Okay.

A. In January, 1968 there was a purchase of 100 shares of U. S. Borax stock at 29 and seven-eighths for total moneys of $3,021.44. The check was received on January 8th for full payment, $3,021.44. The stock at the end of the month was held in street name. In March, 1968 there was a dividend of $25 on U. S. Borax which was sent to the customer and subsequently on 3-28-68 the hundred shares of U. S. Borax were delivered to the customer in customer's name.

Q. Now, this is for the account of Joseph Gay, is it not?

A. Yes, sir.

Q. And what is the date of that last statement?

A. 3-31-68.

Q. Okay. Were there any other transactions in the name of Joseph Gay by your company between 3-31-68 and December 31, 1971?

A. Not to my knowledge.

Q. Okay, and why do you say that?

A. Because we have no records to show this.

Q. If there were transactions, would your company have kept records of it?

A. Yes, sir.

Q. Now, calling your attention to Government Exhibit Number 74, would you identify that, please?

A. This is the statement for Mrs. Stella Gay, 3 Fredro Street, Buffalo, New York, 1-3-68 and 11-30-67.

Q. And what transactions do those statements reflect?

A. 11-30-67 there was a purchase of 200 shares of Niagara Mohawk Power at 20 and an eighth for total moneys of $4,079.26 for which we received a check on November 14th in the amount of $4,079.26. There was a dividend on 50 shares of Singer Company of $27.50 which was cancelled because it was put in that account in error. At the end of the month, 11-29, the 200 shares of Niagara Mohawk Power were delivered to the customer in the customer's name. January, 1968 there was a purchase of 100 shares of U. S. Borax Corporation at 29 and seven-eighths for total moneys of $3,021.44 which was paid on January 8th with a check of $3,021.44 and on 1-26 the hundred shares of U. S. Borax were delivered to the customer in the customer's name.

THE COURT: Would you keep your voice up, please.

THE WITNESS: Yes, sir.

BY MR. MELLENGER:

Q. Did Mrs. Gay conduct any further records with your company other than as reflected on those statements?

A. No, sir.

Q. And what makes you say that?

A. We have no records.

Q. And did you search for any further records?

A. Yes, we did.

Q. Now, Government's Exhibit 73 is a statement of account for Joseph Gay and Government's Exhibit Number 74 is statement of account for Mrs. Stella Gay. Did your company maintain a joint account in the name of Mr.

Joseph and Mrs. Stella Gay?

A. No, sir.

Q. And how do you know that?

A. Because we have no records to that effect.

Q. Did you search for any such records?

A. Yes, we did.

MR. MELLENGER: I have no further questions, your Honor.

THE COURT: Mr. Murphy.

CROSS EXAMINATION BY MR. MURPHY:

Q. [illegible] there any change in the record keeping of Shields & Company at the time that the brokerage firm was changed to its present name?

A. No, sir.

Q. All right.

A. Outside of the fact there was a name change.

Q. A name change, so the records would remain the same?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Now, you are familiar, sir, are you with the United States Borax stock?

A. I don't understand the question.

Q. Well, I am sorry. Wasn't that U. S. Borax stock?

A. Right, common stock, right.

Q. Does that mean United States Borax?

A. Yes, sir.

Q. All right. Wasn't that company taken over by an English firm, sir?

A. I don't know.

Q. You don't know?

A. No.

THE COURT: Mr. Murphy, does that make any difference at all?

MR. MURPHY: Yes, your Honor.

THE COURT: Why?

MR. MURPHY: Because --

THE COURT: All we are involved here with is the purchase and sale of these stocks. It does not make any difference whether it is Canadian, British, German. What difference does it make?

MR. MURPHY: It makes this difference, your Honor, if I may for the record; the British firm took over the stock, the corporation retired the stock of Mr. Gay and paid him for it.

THE COURT: That will be brought out in the record.

MR. MURPHY: Yes.

THE COURT: I am sure that if that is the case that either you or Mr. Mellenger will bring it out.

MR. MURPHY: I am just wondering if he was familiar with it.

THE COURT: We are going to go by the records, not by what anyone recalls because we must have the records here. Even someone as experienced as Mr. Vitanza would not recall. He cannot remember what a particular stock was purchased for or sold for at a particular date and he would be the first to tell us that he would have to go back to the records as of a particular date.

MR. MURPHY: All right. What I am saying, your Honor, what I am trying to get is if this occurred, it would not reflect in Shields --

THE COURT: Mr. Murphy, before we started this trial, you and Mr. Mellenger met and you discussed these matters at great length and I urged you then and I urge you now to enter into stipulations of fact about dates, times, sales, the records of transactions. If this was a matter of concern with you, the simple thing to do and the most direct thing to do and the most accurate thing to do is to bring it up with Mr. Mellenger and to make sure that if there are any records here which are favorable to your client, that they should be in the courtroom here and Mr. Mellenger, if you cannot get them for some reason, - you make sure that the Government gets them, but I cannot see how any questioning of Mr. Vitanza about what he recalls about what happened to some company is of any concern at all. I respect his judgment very much but we just cannot go on recollection.

MR. MURPHY: Your Honor, all I am trying to find out --

THE COURT: I know what you are trying to find out and we can do it, but this is not the way to do it. Do you have any further questions of Mr. Vitanza?

BY.MR. MURPHY:

Q. Well, just this one question. If stock was retired, sir, it would not necessarily appear in your records, isn't that true?

A. The stock --

THE COURT: As you know, he is here as a representative of a brokerage company. If Mr. Gay chose to sell or if the company chose to in some way deal directly with him, then he would not have the record, but somebody has the record. If you have any further questions of Mr. Vitanza --

MR. MURPHY: No, your Honor.

THE COURT: All right. Thank you, Mr. Vitanza. Do you have any further records of this transaction, Mr. Vitanza?

MR. VITANZA: No, I don't, your Honor.

THE COURT: All right. Thank you. Mr. Mellenger, next witness.

MR. MELLENGER: The Government calls Crucian Messina.

* * * * * *

CRUCIAN S. MESSINA (128 Vermont Street, Buffalo, New York), a witness called by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MELLENGER:

Q. Mr. Messina, what is your occupation?

A. I am an attorney and also the Commissioner of Jurors of the County of Erie.

Q. Did you ever have occasion to be retained as attorney for a Mrs. Stella Gay?

A. Yes.

Q. And did you have occasion to handle a traffic accident for Mrs. Gay?

A. Yes.

Q. And when was that?

A. Around the 19th day of November, 1963.

Q. And did you ever have occasion to receive a settlement on behalf of Mrs. Gay?

A. Yes.

Q. And did you turn any of the proceeds of that settlement over to Mrs. Gay?

A. Yes, I did.

Q. And how much did you turn over to her?

A. $1,200.

Q. And when was that?

A. That was on the 8th day of May, 1965.

MR. MELLENGER: No further questions.

CROSS EXAMINATION BY MR. MURPHY:

Q. Mr. Messina, were you also the attorney for Mr. Gay?

A. In that accident?

Q. No, in other matters, sir.

A. Yes, I have at occasion to represent Mr. Gay on some other matters.

Q. During the 1960's?

A. Between the 1960's and '70's.

Q. All right. Now, were you his attorney, sir, on mortgage dealings wherein he gave private mortgages?

A. I may have been on some, yes.

Q. All right, and can you tell me, sir, were there occasions when Mr. Gay gave out mortgages by cash payments, if you recall?

A. That I can't recall.

Q. When you did represent him on private mortgages with individuals other than his family, were those mortgages recorded, sir?

A. Yes.

MR. MURPHY: Thank you. That is all.

THE COURT: Anything else, Mr. Mellenger?

MR. MELLENGER: Nothing of this witness, your Honor.

THE COURT: Thank you, Mr. Messina.

THE WITNESS: Thank you, Judge.

MR. MELLENGER: The Government calls Mary Ann Zajdowicz.

* * * * * * * *

MARY ANN ZAJDOWICZ (2700 William Street, Cheektowaga, New York), a witness called by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MELLENGER:

Q. Where are you employed?

A. Condon & Sedita.

THE COURT: You are going to have to speak up, please.

THE WITNESS: The law firm of Condon & Sedita.

BY MR. MELLENGER:

Q. And what is your position there?

A. I am the office coordinator.

Q. Pursuant to subpoena, did your law firm furnish the Government with certain records?

A. Yes.

Q. I show you what has been marked as Government's Exhibit Number 93 for identification and ask you to look at that, please. Do you recognize that?

A. Yes.

Q. And what is that?

A. It is an accounts receivable card.

Q. And who is that accounts receivable card for?

A. Joseph J. Gay.

Q. And for what address?

A. 3 Fredro Street, Buffalo.

Q. And what information is contained on that card?

A. Disbursements and fee charged to client.

Q. Does that card show any fees charged to Joseph Gay during the period of 1966 through 1971?

A. Yes.

Q. And in what amount?

A. Total fee is four thirty-seven seventy-eight.

Q. And were there any other payments by Mr. Gay to the firm?

A. The total payment received was $500. That was for fee and disbursements.

Q. And that was from Mr. Gay?

A. Yes.

Q. And what date was that received?

A. August 28, 1970.

Q. Does that record indicate any disbursements to Mr. Gay during 1966 to 1971?

A. Disbursements to him?

Q. Yes.

A. No.

MR. MELLENGER: No further questions, your Honor.

THE COURT: Mr. Murphy.

CROSS EXAMINATION BY MR. MURPHY:

Q. This fee was not given back to Mr. Gay, was it?

A. It was not.

Q. Could you explain the entry on the back?

A. Yes. It is the payment received August 28, 1970 to our trust account.

THE COURT: Could you speak more into the microphone?

THE WITNESS: Sure.

THE COURT: You have a very soft voice.

THE WITNESS: Payment received August 28, 1970 and then transferred into the regular operating account September 22nd, - excuse me, September 29, 1972.

BY MR. MURPHY:

Q. I see, so what you did is take five hundred in and put it in the attorney's trust account, make expenditures out of that and then when the fee was earned or the legal service complete, transferred into the regular account, is that correct?

A. Yes.

MR. MURPHY: Thank you. That is all.

THE COURT: Nothing further?

MR. MELLENGER: Nothing further of this witness.

THE COURT: Thank you.

MR. MELLENGER: Anthony Glieco.

* * * * * * *

ANTHONY M. GLIECO (170 Caesar Boulevard, Williamsville, New York), a witness called by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MELLENGER:

Q. Mr. Glieco, have you ever heard of Selective Enterprises, Inc.?

A. Yes, I did.

Q. And what, if any, affiliation do you have with that company?

A. I have been president. It is a private investment club and I have been president of it for about nine years.

Q. Was Joseph Gay a member?

A. Yes.

Q. Do you see Joseph Gay seated in this courtroom?

A. Yes.

Q. Showing you what has been marked as Government's Exhibit Number 94 for identification, do you recognize that?

A. Yes.

THE COURT: Can you keep your voice up, please.

BY MR. MELLENGER:

Q. Okay. That is a series of five checks, are they not?

A. Yes, they are.

Q. And who are those checks signed by?

A. Myself and the secretary.

Q. Now, calling your attention to Check Number 5694, who is that payable to?

A. Joseph Gay.

Q. And on what date?

A. November 25, 1967.

Q. And in what amount?

A. $120.

Q. And for what purpose was that check paid to Mr. Gay?

A. It was six per cent interest on a $2,000 note.

Q. Now, calling your attention to the next check Number 5721, what date was that check?

A. December 5, 1968.

Q. And who was that payable to?

A. Joseph Gay.

Q. In what amount?

A. The same amount, $120.

Q. And for what purpose?

A. Six per cent interest on the $2,000 note.

Q. And calling your attention to the next check bearing Number 5733, who is that payable to?

A. Joseph Gay.

Q. And on what date?

A. September 29, 1969.

Q. And what amount?

A. $120.

Q. And for what purpose?

A. The six per cent interest on the $2,000 note.

A. M. Glieco, for Government, Cross.

Q. And calling your attention to the next Check 5741?

A. August 24, 1974, $120.

Q. Who is that payable to?

A. Joseph Gay.

Q. And what purpose was that payable?

A. For the interest, six per cent interest on the $2,000 note.

Q. And calling your attention to the last check bearing Number 5759, what is the date of that check?

A. June 9, 1971.

Q. And who is that payable to?

A. Joseph Gay.

Q. And in what amount?

A. $120.

Q. And what is the purpose of that check?

A. The interest on the $2,000 note.

Q. And those are all drawn on the account of Selective Enterprises, Inc., are they not?

A. Yes, they are.

MR. MELLENGER: No further questions.

CROSS EXAMINATION BY MR. MURPHY:

Q. How many members are there in Selective Enterprises, Inc.?

A. About sixty-five.

Q. Do you know what Mr. Gay's initial investment was?

A. No, I don't.

Q. Do you know when it was made?

A. No, I don't.

Q. Would your records reflect that?

A. I think it would.

Q. All right. Now, there was a $2,000 loan made by Mr. Gay to the corporation, is that correct?

A. Yes, there was.

Q. And when was that made?

A. I do not know. It was before I became president.

Q. All right, but the records would also reflect that, would they not?

A. Yes, they would.

Q. All right. Do you know would the records reflect the form of payment to the corporation of this loan, either by check or cash?

A. I do not know because this was before my time, before I was president.

Q. All right. How about the initial investment, would that reflect the investment as to whether or not it was made by check or cash?

A. Probably would.

Q. All right. Now, these records were available, is that correct, sir?

A. Yes.

Q. And they were not subpoenaed by the Government?

A. Only these checks.

MR. MURPHY: Thank you. That is all.

THE COURT: Anything else, Mr. Mellenger?

MR. MELLENGER: Nothing further of this witness, your Honor.

THE COURT: All right. Next witness, please.

MR. MELLENGER: The Government calls Alphons Wozniak.

* * * * * *

ALPHONS WOZNIAK (22 Williamstown Court, Apartment 5, Cheektowaga, New York), a witness called by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MELLENGER:

Q. Mr. Wozniak, what is your employment?

A. I am at the time retired.

Q. Before you retired, what did you do for a living?

A. Bookkeeping.

Q. Did you ever have occasion to do any work for a Mr. or Mrs. Wisniewski?

A. Yes, I did.

Q. I'm showing you what has been marked as Government Exhibit Number 83.

A. Do you want me to identify this?

Q. Yes.

A. Against my records?

THE COURT: Mr. Wozniak, it is important that the jury hears and everyone in the courtroom hears, so whatever you say, say it loud enough so we can all hear it.

THE WITNESS: Okay, your Honor.

BY MR. MELLENGER:

Q. Just refer to this exhibit, please. Do you recognize that exhibit?

A. I do.

Q. And what is that?

A. Well, that is a worksheet or a schedule of the mortgage they procured from Mr. Gay and the breakdown of payments.

Q. Okay, and who prepared that statement?

A. May I look at my records just to verify this. I am sure I did.

Q. Okay.

A. I did.

Q. And at whose request did you prepare that?

A. Request of Mrs. Wisniewski, I believe.

Q. And for what mortgage does that show a breakdown of payments?

A. Well, it shows the interest, the principal and the balance thereon.

Q. Okay, and who was that payable to?

A. Payable to a Mrs. Stella Gay.

Q. And on what property was that mortgage?

A. This was at 1787 Clinton Street.

Q. Calling your attention to 1967, what payments were shown in 1967?

A. $525.

Q. And that was when in '67?

A. Pardon me?

Q. What date?

A. July 1, 1967 according to the ledger records.

Q. And what was the breakdown between interest and principal of that payment?

A. Twenty-one fourteen applied to interest; $503.86 to principal.

Q. And what other payments were made in 1967?

A. December 31st apparently their check Number 1417, supposed to be the balance due which was three fifty-forty-seven and the breakdown was eight fifty-five for interest and three forty-one ninety-two principal which would wipe it out barring a little per cent error here.

Q. That record shows the mortgage was paid off at that time?

A. That is correct.

Q. And how did you determine what amount was to be applied toward interest?

A. Normally I take the total amount --

MR. MURPHY: I object to what he normally does, your Honor.

THE COURT: Excuse me. All right, overruled. Tell us in this case. We are interested in what you did here.

THE WITNESS: In this case I took the gross total of five twenty-five and took six per cent interest which was the interest amount and deducted that from the gross amount and the balance was the principal.

THE COURT: Your remarks should be to the jury, Mr. Wozniak.

THE WITNESS: Pardon me?

THE COURT: You speak to the jury and you tell us what you did. That is all.

THE WITNESS: Okay.

BY MR. MELLENGER:

Q. You computed that six per cent interest on what amount? Mr. Wozniak, you computed that six per cent interest on the outstanding balance?

A. On the outstanding balance, right.

Q. And for what time period?

A. That would be for the six months from July 1st to December 31st.

Q. And where did you get the information as to the total payment of each of those payments?

A. From a ledger book on checks because I reconciled the cash, or rather, the checks.

Q. I am showing you what has been marked as Government's Exhibit 83-1 and ask you to look at that. Are those the checks which you got the amount of those two payments from?

A. That is correct.

Q. And how do you know those are the same checks?

A. Well, I assume, - I mean here is the thing, I reconciled them against the cash, the books when the statement came through and then I always look for the endorsement thereon.

Q. Did you keep a record of the check numbers?

A. Yes. I do have them right here.

Q. Those corresponded to those two check numbers, do they?

A. That is correct.

Q. Now, you said this mortgage was owed to Mrs. Gay by Peter Wisniewski?

A. That is right.

Q. Okay. I notice that check is signed or has the purported signature of a Peter White. Who was Peter White?

A. Well, Peter White I was told by him that they had the assumed name certificate with the bank and they could use both names.

Q. Peter White was really Peter Wisniewski?

A. Wisniewski, that is correct.

MR. MELLENGER: I have no further questions, your Honor.

CROSS EXAMINATION BY MR. MURPHY:

Q. Is this, sir, the mortgage on a building which they purchased from Mr. Gay?

A. I understand it was, yes, sir.

Q. All right, and did Mrs. Wisniewski subsequently take another mortgage from Mr. Gay?

A. She did on Cable Street, on the property on Cable Street.

Q. All right, and your records reflect that, is that correct?

A. That is correct.

Q. Do you know what the original mortgage was, sir?

A. For which property?

Q. Well, let's take the Clinton Street property first.

A. The Clinton Street property was $9,000.

Q. That was a mortgage, isn't that right?

A. Mortgage, right.

Q. And do your records reflect the purchase price of that building?

A. No, just the mortgage.

Q. All right. Now, when was the second mortgage given to Mrs. Wisniewski?

A. June 3, 1968.

Q. And --

A. The amount was $7,000.

Q. $7,000?

A. Right.

Q. All right. That would be a six per cent mortgage, is that correct?

A. That is correct.

Q. And payments were being made. Does your record reflect whether that mortgage is now paid up?

A. I have only worked on this through '72 and apparently it is paid because I saw a discharge of the mortgage since.

Q. Yes, both mortgages, sir, as you understand --

A. I did see them for the first time.

Q. Please, both mortgages as you understand it were put on file in the Erie County Clerk's office?

A. To my knowledge I understand that.

MR. MURPHY: Thank you.

THE COURT: Anything else?

MR. MELLENGER: Nothing further of this witness, your Honor.

THE COURT: That is all. Thank you.

MR. MELLENGER: Walter Harris.

MR. MURPHY: I am sorry, your Honor, is the witness taking these exhibits back with him?

THE COURT: Do you have exhibits here?

MR. MELLENGER: I have two.exhibits, your Honor.

THE COURT: Those were the ones that were marked. He can take anything else back with him.

MR. MURPHY: Well, your Honor, I would like to put into evidence the exhibits that he used to testify from, or copies thereof.

THE COURT: Have Mr. Wozniak, Mr. Mellenger, - have him come back in for a minute, please. Swear the witness, please, Mr. White.

THE COURT: Mr. Wozniak, can you step up a minute, please. Did you use some other material there to testify?

THE WITNESS: Pardon me?

THE COURT: When you testified you referred to some other papers in your folder?

THE WITNESS: No. I just testified to the folder pertaining to these two mortgages.

THE COURT: I see, but you have it in the folder there?

THE WITNESS: Yes, I do.

THE COURT: Can you come over, please, and show me what you used.

THE WITNESS: Sure.

THE COURT: Mr. White, would you go with Mr. Wozniak and make Xerox copies of these papers, deliver the originals back to Mr. Wozniak and then we will mark these as an exhibit, marked as a Defense Exhibit.

THE WITNESS: This is only a duplicate of this.

THE COURT: Whatever it is.

THE WITNESS: You wouldn't need this then?

THE COURT: Was this used?

MR. MURPHY: I understand it is not complete.

THE WITNESS: I have a complete list.

THE COURT: Mr. Wozniak, we will make a copy.

THE WITNESS: All right.

THE COURT: And give you back the originals and then the lawyers can determine and I will determine how we will use the copies. Thank you very much. You just go with Mr. White in a minute.

* * * * *

WALTER HARRIS (229 Windsor Road, Staten Island, New York), a witness called by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MELLENGER:

Q. Mr. Harris, where are you employed?

A. I am employed at the Bank of New York in New York City.

Q. And what is your position?

A. I am Assistant Vice-President.

Q. And pursuant to subpoena, did you have occasion to furnish the Government with certain records pertaining to a Joseph Gay?

A. Yes, sir, I did.

Q. I show you what has been marked as Government's Exhibit Number 153. Do you recognize that?

A. Yes, sir. These are copies of our year-end statements for a Dreyfuss Program account for which we are custodian and transfer agent.

Q. And what information is reflected on that statement?

A. The information that is shown on these statements reflect the investments that are made into this particular mutual fund that we handle and also any dividends that are paid on the account by Dreyfuss Fund.

Q. And that is for Joseph Gay, is it not?

A. Yes, sir, it is.

Q. Does that give an address for Mr. Gay?

A. Not on this statement I am looking at here, sir.

Q. Now, what, if any, transactions are reflected on those accounts for the period January 1, 1966 through December 31, 1971? Excuse me, January 1, 1967 through --

A. All of the transactions that are shown on these statements for those years reflect dividends that were declared by Dreyfuss Fund and credited to this particular account.

Q. Okay, and what are the amounts of those dividends?

A. Do you want each individual one?

THE COURT: Keep your voice up, please.

BY MR. MELLENGER:

Q. Yes, sir.

A. Yes, sir. All right. On January 26, 1967 there was a dividend of $373.01 credited to this particular account. It was reinvested and purchased an additional 26.963 shares of Dreyfuss Fund. On April 27, 1967 there was a dividend of $69.44 which was reinvested and purchased an additional 4.730 shares. On July 27, 1967 there was a dividend of $69.72 which was reinvested and purchased an additional 4.545 shares. On October 26, 1967 there was a dividend of $69.99 which purchased an additional 4.635 shares. They were the four dividends that were paid in the year 1967 and, - I am sorry, on January 25, 1968 there was a dividend of $620.74 credited to this account which was reinvested and purchased an additional 42.722 shares. On April 25, 1968 there was a dividend of $72.84 credited to this account which reinvested purchased an additional 4.928 shares. On July 25, 1968 there was a dividend of $73.13 which was reinvested and purchased an additional 4.948 shares. On October 24, 1968 there was a dividend of $73.43 credited to this account which purchased 4.595 shares.

Q. I notice there is an address on that particular statement given for Mr. Gay. What is that address?

A. 3, - I can't make out this on the copy. It looks like P-r-e-d-r-o Street, Buffalo 6, New York.

Q. Okay, fine. Thank you. And what other transactions are reflected on these statements?

A. In the year 1969 there was a dividend paid to this account on January 24, 1969 in the amount of $1,867.18 which purchased 124.954 shares. On April 24, 1969 there were $81.20 credited to the account which purchased an additional 5.833 shares. On July 24, 1969 there was a dividend of $81.55 which purchased 6.462 shares. On October 23, 1969 there was a dividend of $81.94 which purchased 5.972 shares. They were the four dividends for the year 1969. In the year 1970 on January 28, 1970 there was a dividend of $809.26 credited to the account which reinvested purchased 69.062 shares. On April 22, 1970 there was a dividend of $86.44 which reinvested purchased 7.989 shares. On July 29, 1970 there was a dividend of $86.92 which reinvested purchased 8.824 shares and on October, - I am sorry, on October 28, 1970 there was a dividend of

$87.45 which reinvested purchased 8.417 shares. They were the four dividends for the year 1970. On January 27, 1971 there was a dividend of $293.18 which purchased,- which reinvested purchased an additional 23.899 shares. On April 28, 1971 there was a dividend of $89.39 which reinvested purchased 6.798 shares. On July 28, 1971 there was a dividend of $89.80 which reinvested purchased an additional 7.385 shares. The next one, two, three, the next two transactions shown on the statement for the year 1971 are internal changes that we make on our part when we change the salesmen on one of our accounts, so after those two transactions there is a dividend on October 27, 1971 in the amount of $90.24 which purchased 7.916 shares.

Q. These records, - are you the custodian of these records?

A. Yes, sir, we are.

Q. And these were made and maintained in the regular course of business of your firm?

A. Yes, sir, they are.

MR. MELLENGER: I have no further questions.

CROSS EXAMINATION BY MR. MURPHY:

Q. Sir, at the close of the year, do you send a United States Internal Revenue Service form to the shareholder indicating that he nas received these dividends over the year?

A. We send a 1099 notification to each shareholder in this particular fund on the dividend advice that we use on the January dividend. The 1099 information is put on the bottom of that advice.

Q. All right, and you also send the original copy to the Internal Revenue Service, is that true?

A. Yes, sir.

Q. So that the IRS is informed that Mr. Gay has received all of these dividends and Mr. Gay is also informed of that?

A. Yes, sir.

Q. Is that true?

A. Yes, sir.

MR. MURPHY: That is all.

THE COURT: Thank you, Mr. Harris.

MR. MELLENGER: The Government calls John Toth.

(Defendant's Exhibit Number 19 marked for identification.)

* * * * *

JOHN TOTH (61 Duncan Avenue, Jersey City, New Jersey), a witness called by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MELLENGER:

Q. Mr. Toth, where are you employed?

A. I am employed at the First Jersey National Bank in Jersey City, New Jersey.

Q. And what is your position?

A. I am an officer with the bank as custodian for mutual fund.

Q. And what mutual fund is that?

A. It is Anchor Growth Fund, Incorporated.

Q. And pursuant to a subpoena, did you bring with you certain records?

A. Yes, I did.

Q. I show you Government's Exhibit Number 154 marked for identification and ask you to look at that and are those the records that you brought with you today?

A. Yes, they are.

Q. And are you the custodian of that record?

A. Yes, we are.

Q. And is that record made and maintained by the First Jersey National Bank in the ordinary course of business?

A. Yes, it is.

Q. And what is that record?

A. It is a history of all transactions that have transpired in the account since its inception.

Q. Okay, and who is that account for?

A. Name of Joseph J. Gay.

Q. Calling your attention to the third page of that transcript of account, that reflects the period from January 3, 1967 through December 5, 1975, does it not?

A. Yes, it does.

Q. Were there any transactions prior, - were there any transactions in 1967 which occurred prior to January 3rd?

A. No, there were not.

Q. Okay. Would you tell the ladies and gentlemen of the jury what transactions transpired in that account between January 3, 1967 and December 31, 1971?

A. Okay. There is a series of capital gain distributions that the account received and sales of dividends.

Q. Would you tell the ladies and gentlemen what capital gains distribution and what dividends and what dates those were made on, and also as to whether that was received in cash or reinvested?

A. Okay. All moneys were reinvested into the account. On January 3, 1967 there was a capital gains for $1,112.78. On June 1, 1967 there was a dividend for $62.56. On

December 4, 1967 a dividend for $62.81. On January 2, 1968 a capital gains distribution of $1,060.71. On June 4, 1968 a dividend of $[illegible].88. On December 2, 1968 a dividend of $72.84. On [illegible] 2, 1969 a capital gains distribution of $1,1[illegible]. On June 4, 1969 a dividend of $72.13. On December 2, 1969 a dividend of $108.62. On January 2, 1970 a capital gains distribution of $279.35. On June 3, 1970 a dividend of $111.35. On December 3, 1970 a dividend of $137.33. Do you want this further?

Q. Up until December 31, 1971.

A. Okay. On June 3, 1971 a dividend of $113.47, and on December 3, 1971 a dividend of $88.85.

Q. And these were all reinvested, were they not?

A. Yes, they were.

MR. MELLENGER: I have no further questions.

CROSS EXAMINATION BY MR. MURPHY:

Q. What was the initial investment, sir?

A. The initial investment transpired on May 23, 1960. It was a purchase of 99 shares at a price of $10.75.

Q. So that would approximately be how much?

A. It was approximately over $1,000.

Q. A little over one thousand?

A. Yes.

Q. All right, and then that was the history of the account that you gave from '67 on, isn't that correct?

A. From 1960.

Q. No, the initial investment was in 1960 and then you gave us the history of the account from '67 on?

A. That's correct?

Q. Including capital gains that were in excess of a thousand dollars, isn't that true?

A. That's correct.

Q. All right. Now, your bank would then send a 1099 to the shareholder, would it not?

A. Yes, it would.

Q. And also to the IRS?

A. Yes, it would.

Q. Reflecting both dividends and capital gain, is that true?

A. That's correct.

Q. Now, would it reflect whether it was a long term or a short term capital gain?

A. No, it would not.

Q. Would that depend on the initial investment?

A. Yes, it would.

MR. MURPHY: Thank you. That is all.

THE COURT: Mr. Mellenger.

MR. MELLENGER: Nothing further of this witness.

THE COURT: Thank you. Ladies and gentlemen --

MR. MELLENGER: Your Honor, may I approach the bench?

THE COURT: In a minute. Thank you, Mr. Toth. Ladies and gentlemen, we are concerned in this case with the years 1967 to 1971. It may be that sometimes events which occurred before that time or after that time may be of concern to us here but in that regard you should certainly listen to all the evidence we hear in the case, but in your handling of it, you must follow my charge on the law which applies. The Government is not obliged to show the complete history of the transaction. For example, if there was a series of stock sales and purchases which began in the '50's or in the early '60's and ran through into the '70's, unless it is pertinent to the calculation of the tax, for example, it does not make any difference whether or not Mr. Gay had a capital gain or loss in the year 1973. It would not make any difference if he made a lot of money or if he lost a lot of money. It may have some bearing upon the calculation of the capital gains or a loss if he purchased some stock, let us say, back in 1960 or any year before the tax time started and then he sold it in the period which we are involved with, - that is '67 to '71, because then you would have to know what he bought it for, let us say, back in 1960 and what he sold it for. Let us say he sold it in 1968, and then from that the difference then we would calculate the gain or loss. Short term and long term are words which have a very special meaning in the tax law and we will get to those definitions as we go on and if they are appropriate for the consideration here. As Mr. Mellenger told you in the beginning, there is a lot of hard going in a tax case because you have to put all these little pieces up on the wall and then finally someone will come in here, we hope with the calculations and give us his opinion which will be based upon the facts, which can only be what is in the evidence here and his knowledge or expertise in this particular field so as we go again I say to you do not make up any judgments here one way or the other. It is our obligation right now to listen but not to come to any conclusions one way or another as to the tax liability. It does not make any difference whether Mr. Gay owned a lot of stock or owned a little stock. That is beside the point. The point is whether under the facts of this case and under the law as I apply it to you, whether or not he violated the law. That is the only thing our ultimate conclusion will be.

Mr. Mellenger, do you have a problem?

(Off the record conference had at the side bar between Court and counsel.)

THE COURT: Every trial you are to have every witness here. You are not to assume. This trial is not run for the convenience of witnesses or for the convenience of your office. We have the jury here and we are ready to go. Witnesses from out of town, you tell them if necessary to be here the night before. Again on this case, and I say to both of you that you are, Mr. Murphy, you are entitled to cross examine every witness if you desire, but it seems to me that if stipulations can be entered into about the facts of this case that you ought to, both, so that the jury and I can understand the issue here, that it is to the advantage of both sides to enter into stipulations of fact. You do have some witnesses?

MR. MELLENGER: Yes.

THE COURT: All right. It happens, ladies and gentlemen, and I bawled Mr. Mellenger out and in these cases you never know how long a witness is going to be. You can bring a fellow in and you can think he is going to be on the stand for five minutes and he is on for five hours, and you bring another fellow in and think he is going to be on for an hour and he is gone in five minutes, and it is hard to really judge and I suppose that in a certain sense this is Monday morning quarterbacking on my part, but on the other hand, there are a lot of other cases to be tried here and it seems to me that I have to play the part of the ogre once in awhile just to get the cases in and get them disposed of.

In any event, we will now take a recess for an hour. If you want to take a walk or do anything else, go ahead and do it. You are certainly not obliged to stay in the jury room for an hour, but in any event, come back a few minutes before noon and we will reconvene at that time and continue the trial of the case then. You may go out with the marshal.

(Jury escorted from the courtroom.)

THE COURT: We will be in recess.

(Recess taken at 11:01 a.m.)

* * * * * *

PROCEEDINGS: After recess, 12:03 p.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury present.)

THE COURT: Mark those in evidence.

(Government Exhibits Numbered 155, 156 and 157 received in evidence.)

THE COURT: Mr. Mellenger, when you are ready.

MR. MELLENGER: Yes, your Honor. The Government calls Shirley Fitzgerald.

SHIRLEY FITZGERALD (28 Waverley Road, North Andover, Massachusetts), a witness called by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MELLENGER:

Q Is that Miss or Mrs.?

A Mrs.

Q Mrs. Fitzgerald, where are you employed?

A Prudential Insurance Company of America in Boston.

Q What is your position there?

A. I am a correspondent in the Insurance Services Division.

Q. As a correspondent, do you have access to premium payment records?

A. Yes, I do.

Q. And pursuant to a subpoena, did you bring with you certain records of the Prudential Insurance Company?

A. Yes, I did.

Q. I am showing you what has been marked as Government's Exhibits 91, 91-1, 91-2, 91-3, 91-4, 91-5 and 91-6 and ask you to look at those, please, and who do those records pertain to?

A. They are the policy records for Joseph Gay and Stella Gay.

Q. And for what time period do those records pertain to?

A. 1967 to 1971.

MR. MELLENGER: Your Honor, I would like to move Government's Exhibits 91 and 91-1 through 91-6 into evidence.

THE COURT: Any objection?

MR. MURPHY: No objection, your Honor.

THE COURT: Mark them in evidence.

(Government's Exhibits Numbered 91, 91-1 through 91-6, respectively and inclusive, received in evidence.)

BY MR. MELLENGER:

Q. Calling your attention to Government Exhibit Number 91, what is that?

A. It is the records for Policy Number 2656217.

Q. And who is the insured?

A. Joseph Gay.

Q. And what was the annual premium paid on that policy for 1967, '68, '69, '70 and '71?

A. $571.84 per year.

Q. That amount was paid each of those years?

A. Yes, it was.

Q. Okay. Were there any dividends on that policy?

A. Yes, there were dividends credited each of the year and they were left to accumulate with the Company at interest.

Q. Okay, and what were those dividends accumulated each year?

A. For 1967 the dividend accumulated was $34.93; for 1968 it was $46.92; for 1969 it was $59.02; for 1970, $79.97 and for 1971, $102.41.

Q. And what was the interest paid on those accumulated dividends for each of those years?

A. In 1967 there was no interest credited. In '68 there was a dollar sixty-one. In '69 there was $3.84; in '70 $7.32 and in '71 $11.68.

Q Okay. None of these dividends or interest was withdrawn by the insured?

A No.

Q Calling your attention to Government Exhibit Number 91-I, would you identify that, please?

A This is the records for Policy Number 20133633.

Q Who is the insured on that policy?

A Joseph Gay.

Q What were the annual premiums paid for the years 1967 through 1971?

A The annual premium due each year was $2,049.08. The premium that became due in 1967 was paid in advance in 1966 so that there was no premium payment in '67. All the other years there were premium payments.

Q That was $2,049.08?

A Yes.

Q And were there any annual dividends on that policy?

A Yes, there were.

Q In what amounts?

A In '67, $543.84; in '68, $571.56; in '69, $628.32; in '70, $699.86; in '71, $834.77.

Q Okay. Any interest paid on those dividends accumulated?

A In 1967 there was interest credited of $159.46; in '68, $204.95; in '69, $240.67; in 1970 there was $305.04; in '71 there was $355.29.

Q Were any of these dividends or interest withdrawn by the insured?

A. No.

Q They were all accumulated?

A. Yes, during this time.

Q Calling your attention to Government's Exhibit 91-2, would you identify that, please?

A. These are records for Policy Number 17567003.

Q And who is the insured on that policy?

A. Joseph Gay.

Q And what were the annual premiums paid on that policy?

A. Let me see, $131.65.

Q And that was for what year?

A. For all of the years, '67 through 1971.

Q So there would be a payment of $131.65 for each year beginning with 1967 through '71?

A. That was the premium due. The dividend option at that time was reduction of premium, however, so that the dividend credited each year was used to reduce the amount of premium paid.

Q And what was the dividend credited each year?

A. In 1967 it was $60.85; in 1968 it was $60.85; in '69 it was $63.95; in '70 it was $67.50 and in '71 it was $73.55.

Q Calling your attention to Government's Exhibit Number 91-3,

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would you identify that, please?

A. These are records for Policy Number 9508661.

Q. And who is the insured on that policy?

A. On this policy the insured is Stella Gay.

Q. Okay, and what premiums, if any, were paid for the years '67 through 1971?

A. There weren't any. This policy was paid up during that time.

Q. Was it paid up during that time or previous to that time?

A. It was paid up in 1956.

Q. Were there any dividends paid on that policy during '67 through '71?

A. Yes, there were.

Q. In what amounts?

A. In '67 it was $9.30; '68 it was $10.32; '69 it was $10.63; in '1970 it was $10.97 and in '71, $13.25.

Q. Now, were these accumulated or were they paid out to the insured?

A. They were paid out to the insured each year as they became due.

Q. I show you Government Exhibit Number 91-4. Would you identify that?

A. These are microfilm reproductions of the checks that were issued during those years and cashed.

S. Fitzgerald, for Government, Direct.

Q. Okay, and who are those checks issued to?

A. Stella Gay.

Q. Those were the dividend checks, were they not?

A. Yes.

Q. Are the originals of those checks available?

A. No. They have been destroyed in our normal operations.

Q. I show you Government's Exhibit Number 91-5 and ask you to identify that, please.

A. These are the policy records for Policy Number 9496562.

Q. And who is the insured on that policy?

A. Joseph Gay.

Q. And calling your attention to the years '67 through '71 were there any premiums paid on that policy?

A. No. The policy became paid up in 1956.

Q. Were there any dividends paid on that policy?

A. Yes, there were. In '67 there was $9.06; in '68, $10.02; '69, $10.32; in '70, $10.63 and '71, $12.88.

Q. Okay, and were these accumulated or paid out?

A. Paid out as they became due.

Q. I show you Government's Exhibit 91-6 and ask whether you can identify that?

A. These are microfilm reproductions of the checks issued '67 through '71.

Q. Issued to whom?

A. Joseph Gay.

Q Was that for the dividends paid to Mr. Gay?

A. Yes.

MR. MELLENGER: I have no further questions of this witness, your Honor.

THE COURT: Any questions?

CROSS EXAMINATION BY MR. MURPHY:

Q On the dividends and interest that are credited to the account of the policy holder, does the insurance company send out a tax form, 1099?

A. Only in the case where the interest credited to the accumulations is greater than $10.00.

Q All right, so if it is less than $10.00 it doesn't have to be sent out?

A. No.

Q All right. Now how about the dividends?

A. The dividends, as far as we understand, are not taxable and are not reported as far as any kind of a tax form goes.

Q All right, so only when the interest was over $10.00, would the tax payer get a 1099 form, is that correct?

A. Yes.

MR. MURPHY: All right. Thank you. That is all.

THE COURT: Thank you.

MR. MELLENGER: William Bennett.

* * * * * * * * * * * * * * *

WILLIAM T. BENNETT (28 Berkshire Avenue, Sharon, Massachusetts), a witness called by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MELLENGER:

Q. Mr. Bennett, where are you employed?

A. John Hancock Mutual Life Insurance Company, Boston, Mass.

Q. And what is your position there?

A. Associate Director.

Q. And would you briefly describe your duties as Associate Director?

A. Well, we are responsible for the collection and accounting of all ordinary premium payments.

Q. Now, pursuant to a subpoena, did you cause the records of your company to be searched for any policies in effect in the name of Joseph Gay?

A. Yes, we were.

Q. And did you find any such records?

A. Yes, we did.

Q. I show you Government's Exhibits 155, 156 and 157 and ask you to look at those.

A. Exhibit 155 is a premium history on Policy 8611802.

THE COURT: Mr. Bennett, can you keep your voice up, please?

THE WITNESS: Surely.

BY MR. MELLENGER:

Q Mr. Bennett, are those the records which you found kept by your company, pertaining to Mr. Gay?

A They are.

Q Okay, and those are kept and maintained in the ordinary course of business?

A That's right.

Q And what period of time do those records pertain to?

A From October 1967 through October 1971.

Q Okay. If there were any transactions pertaining to those policies during 1967, but prior to October, would they be reflected in those records?

A Yes. We have a premium history of those years.

Q Okay. Were there any prior transactions in 1967, prior to October?

A None that I know of.

Q Okay. Were you able to find any?

A No, except the dividend transactions. They were also on the anniversary of the policy, the dividends are apportioned as well as the premiums being paid so there is a record of the dividends that were apportioned to that policy during those years.

Q Now, I notice that the time period covered by those records extends to October of 1971.

A. Inclusive.

Q Yes. Would there be any transactions relative to that policy after October of 1971 but in the calendar year 1971?

A. Could you repeat that question?

Q Okay. That statement goes to October of 1971, does it not?

A. Inclusive of 1972.

Q Up to 1972?

A. That's right.

Q So those statements would cover all transactions beginning with January 1, 1967 through December 31, 1971, would they not?

A. They would.

MR. MELLENGER: Okay. Your Honor, I offer Government's Exhibits 155, 156 and 157 into evidence.

THE COURT: Mr. Murphy.

MR. MURPHY: I have no objection, your Honor.

THE COURT: Mark them in evidence, please.

(Government Exhibits Numbered 155, 156 and 157 received in evidence.)

BY MR. MELLENGER:

Q I show you Government's Exhibit Number 155 and ask you to identify that.

A That is a premium history of premiums that were paid on this policy from October, 1967 through October, 1971.

Q Okay, and what premiums were paid relative to that policy?

A The October annual premiums in the amount of $242.40 for each year.

Q Each year, and that was paid in '67, '68, '69, '70 and '71?

A That's correct.

Q I show you Government's Exhibit Number 156. I ask you to identify that.

A These are photographs of the checks that were received for all the payments for those years.

Q Do you have the originals of those checks?

A No, we do not.

Q Did you cause the records of your company to be searched for the originals?

A No. They would be destroyed after they were microfilmed.

Q And who were those checks payable to?

A Payable to John Hancock signed by Joseph Gay.

Q And those are for the amount of the premiums?

A $242.40.

Q I show you Government's Exhibit Number 157. Will you identify that?

A. This is the history of dividends for the same policy for the years 1967 through 1971, the amount of dividends apportioned and the amount of interest that was accumulated in which the dividend option was "C".

Q The dividend was what?

A. "C" which meant it was accumulated.

Q Were these dividends paid out to the insured?

A. No, they were not.

Q In 1967, what dividends were credited to Mr. Gay and what interest accrued thereon?

A. $22.40 in dividend and $1.61 in interest.

Q Okay, and what about 1968?

A. $25.00 in dividends and two sixty-two in interest.

Q And 1969?

A. Twenty-seven seventy and $3.78 in interest.

Q And 1970?

A. $30.50 dividends; $5.10 interest.

Q And in 1971?

A. Thirty-three ninety-five and seven 0 seven interest.

Q And all those dividends and interest were accumulated and not paid out, is that right?

A. That is actually right.

MR. MELLENGER: No further questions.

CROSS EXAMINATION BY MR. MURPHY:

Q All right. Mr. Bennett, you indicated that the checks were destroyed after being microfilmed?

A That is correct, sir.

Q No, the original check would go back to Mr. Gay, would it not?

A Yes, but as far as our microfilm is concerned, we photograph the notices and we photograph the checks.

Q I see.

A And we hold those until the premium account for that particular day are balanced, after which we destroy the notices.

Q But these checks went back to Mr. Gay, isn't that true?

A That's right. He received his cancelled checks through the bank.

Q I note, sir, on Government Exhibit 157 and all the way through this we have been talking about your policy Numbe[illegible]611802, is that correct?

A That's correct.

Q And this is Joseph Gay is the one who paid for it, is that right?

A That is correct, sir.

Q And the policy, though, is on the life of one Peter Russo?

A He is the insured. Mr. Gay is the owner.

Q He owns the policy but the insured is Peter Russo, is that correct?

A. That is correct.

Q. Now, when you say he is the owner of the policy, - Mr. Gay, - by that do you mean that the dividends would have been payable to him?

A. That is right, sir.

Q. All right. Now, how about the beneficiary of the policy?

A. At the time that the insured died, the proceeds of the policy would have been paid to the beneficiary.

Q. All right, but we don't necessarily know from these records who the beneficiary is, is that correct?

A. No, we do not.

Q. Now, these dividends, sir, do you send out a tax form, 1099 on these dividends?

A. If it is over $10.00 we do.

Q. On the dividends or the interest?

A. The interest.

Q. All right, but the dividends are non-taxable.

A. They are non-taxable, right.

Q. So only the - -

A. Interest would be.

Q. So on no occasion then would the interest have to have been reported, is that correct, with regard to this policy there is no interest that you have read over a $10.00 amount?

A. No sir, so therefore it would not be reportable on a 1099.

MR. MURPHY: Thank you. That is all.

THE COURT: Thank you, Mr. Bennett.

THE WITNESS: Thank you, sir.

MR. MELLENGER: That is all. Frank Mazurowski.

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FRANK MAZUROWSKI (Homestead Road, Hamburg, New York), a witness called by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MELLENGER:

Q. Mr. Mazurowski, do you know an individual by the name of Joseph Gay?

A. Yes.

Q. Is that the same individual seated over there at that table?

A. Yes.

Q. Did you ever have occasion to borrow any money from him?

A. Yes.

Q. And in what form was that, personal loan or mortgage loan?

17 A. One of each.

Q. Both a mortgage and a personal loan?

A. Yes.

Q. Regarding the mortgage loan, when was that loan made to you? Do you remember the date?

A. Pardon me?

Q. Do you remember the date offhand? Do you have something which refreshes your recollection?

A. Yes.

Q. And what is that?

A. Just a little slip of paper which tells me the right dates.

THE COURT: Mr. Mazurowski, the people that have to hear you are the jurors. Keep your voice up so we can hear you, will you, please?

THE WITNESS: All right. That would have been in 1971. I don't know exactly what month.

BY MR. MELLENGER:

Q. What was the amount of that loan?

A. $6,000.

Q. And were any payments made to Mr. Gay on that loan in 1971?

A. Yes. The payments were all made to Stella Gay.

Q In 1971?

A Oh, you mean the payments. No, the payments weren't made until '72. Well, they started in '72.

Q Calling your attention to the personal loan, when was that made?

A I think that was in 1970.

Q That would be May of 1970?

A Probably, yes. That's when I bought my house, right.

Q And how much was that loan for?

A The amount?

Q Yes.

A $1,200.

Q Okay, and did you repay that loan?

A Yes.

Q And how did you repay that loan?

A In monthly payments.

Q And when did those monthly payments commence?

A Probably around June or July. I don't know the exact month.

Q And in what amounts were those payments made?

A $100 plus $7.00; $107 a month.

Q And did you make those payments each for 12 consecutive months?

A Well, 12 or 13, yes. I mean like if I was late or something, it was all paid back, though.

MR. MELLENGER: No further questions.

CROSS EXAMINATION BY MR. MURPHY:

Q Mr. Mazurowski, where are you employed, sir?

A. Buffalo Savings Bank.

Q And in what capacity?

A. I am an administrative supervisor.

Q All right. Now, how long have you known Mr. Gay?

A. All my life, Well, ever since I can remember now.

Q All right. Is it fair to say you know him from the neighborhood?

A. Yes. I grew up in the same neighborhood.

Q And your families were friends also?

A. Yes.

Q Now, were you working at the bank at the time that you got this mortgage from Mr. Gay?

A. Yes.

Q All right, and you say the amount was, - or what year was it?

A. In 1971.

Q 1971, all right. Was the amount of $6,000?

A. Right.

Q Now, was that money given to you in cash, sir?

A. It was brought over to the bank in cash and changed over to a draft.

Q All right.

A. In other words, I didn't want to walk around with $6,000 in cash so I just changed it into a draft.

THE COURT: I think, Mr. Murphy, - well, all right, go ahead.

BY MR. MURPHY:

Q All right. Now, the $1,200 loan that was made to you in the year 1970 - -

A. Yes, right.

Q All right. Now, you indicated that you paid it back but were there some months that you missed, sir?

A. Well, I honestly don't remember, but I know that my payments have never been like, - they are due on the first, - I don't make them on the first is what I mean, you know. It might be the first week or the second week after it is due.

Q All right. Now, has Mr. Gay ever charged you any additional interest for being late?

A. No.

Q Or any late payment?

A. No.

Q Has he ever attempted to foreclose your mortgage,sir?

A. No, sir.

MR. MURPHY: Thank you.

THE COURT: Thank you, Mr. Mazurowski. Next witness, please.

MR. MELLENGER: The Government calls John Quinn.

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JOHN QUINN (111 West Huron Street, Buffalo, New York), a witness called by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MELLENGER:

Q Mr. Quinn, where are you employed?

A U.S. Treasury Department, Internal Revenue Service.

Q And what is your position?

A I am a Special Agent with the Intelligence Division.

Q How long have you had that position?

A Approximately 10 years.

Q In the 10 years you have been a Special Agent, did you ever have occasion to investigate a Joseph J. Gay?

A Yes, sir.

Q And did you ever meet Mr. Gay?

A Yes, sir.

Q And how many times did you meet him?

A. I met Mr. Gay on three occasions.

Q. Do you see Mr. Gay present in this courtroom?

A. Mr. Gay is sitting next to Mr. Murphy at the defense table.

Q. Okay. When was the first time you met with Mr. Gay?

A. I met Mr. Gay when I went with Special Agent Krysztof in January of 1972, I believe, to Mr. Gay's residence for the purpose of returning some records.

Q. Okay. Did you have occasion to conduct an interview with him at that time?

A. It wasn't an interview as such. It was merely for the purpose of returning records as I recall.

Q. When was the next occasion on which you met Mr. Gay?

A. I met Mr. Gay, February 21st of 1973.

Q. And did you have occasion to conduct an interview with him at that time?

A. Yes, sir.

Q. Did you make a memorandum of that interview?

A. Yes, I did.

Q. Did you reduce that to writing?

A. Yes, sir.

Q. I am showing you what is marke[illegible] Court Exhibit Number 10 and ask you to look at th[illegible]

A. Yes, sir. That is my memorandum of the February 21st interview.

Q And how soon after that interview was that memorandum prepared?

A That would have been prepared either that day or the next day.

Q Okay. The information contained therein, was that a correct memorandum of that interview at the time you prepared it?

A Yes, sir.

Q Did you have occasion to sign that memorandum?

A Yes, sir.

Q This February meeting, where did that take place?

A That took place in the Intelligence Division Office in the Federal Building on Delaware Avenue.

Q And who was present at that time?

A Mr. Gay was present; Ted Willis who was an Accountant Representative; Special Agent Donald Brownell and myself.

Q And what was said at that time?

A I asked Mr. Gay various questions about his financial activities specifically for the year 1967 through 1971.

Q You said Agent Brownell was with you. Who was the Special Agent in charge of that investigation?

A At that time, I was.

Q You were. You know whether Mr. Brownell had ever been in charge of that investigation?

A Yes, sir.

Q At what point did you take charge of the investigation?

A I believe I took it over in August of 1972.

Q And when was Mr. Gay informed that there would be a different Agent handling the investigation?

A I advised him at that time that I was now the Agent working on the case.

Q And did you advise him of anything else at that time?

A I submitted to him a power of attorney which he could execute if he wished representation during the remainder of the investigation. I advised him that I had been examining certain records relating to his financial activities during the years '67 through '71 and that I wanted to ask him some further questions to clarify some of the transactions. I advised him that, as he had been advised by Special Agent Krysztof previously that he had the right to refuse to answer any question which he thought might incriminate him.

Q And after you advised him of that, did you ask him anything?

A Yes.

Q Did you ask him anything about prior year's tax returns?

A I asked him about the preparation of his tax returns in general, specifically for the years 1966 through 1970.

Q And what did you ask him about the preparation of those returns?

A. Well, I asked him what the documents were that were used as a basis of the preparation of those returns and he advised me that the returns were made out by his accountant at that time, Frank Kuras. He, Mr. Gay, provided Mr. Kuras with the information each year to make out those returns. He provided him with the bank statement, what are called Form 1099's for the interest on the bank accounts; dividends, 1099's, and regarding his dividends on his stock holdings. He said if there was any security transactions during the year, specifically sales or purchases, that he would provide Mr. Kuras with the broker's statement.

Q. Were you aware at this time, that Mr. Gay had a printing business?

A. Yes.

Q. Did you ask him about that information as it pertained to his '66 through '70 returns?

A. Yes.

Q. And what did he say about that?

A. He said that the information regarding the income and the expenses from his printing business was provided by him to Mr. Kuras in the forms of slips of paper relating the income and expenses.

Q. Did you ask him about the itemized deductions on his return?

A. He stated that the itemized deductions were taken primarily from his checking account which was in the name of Gay Printing, with the exception of a few estimates normal on a tax return such as gasoline taxes and sales taxes.

Q. Now, these were for his '66 to '70 returns, were they not?

A. That's right.

Q. And this discussion, did you ever ask him about his 1971 return?

A. At that point I showed him his 1971 return. I asked him to identify it which he did. He looked at his signature.

Q. I am showing you what has been marked as Government's Exhibit Number 8 for identification. Do you recognize that?

A. This is the original of the return which I showed Mr. Gay at that time, the 1971 return in his and his wife's name.

Q. And is that the one he acknowledged as being his return?

A. Yes, sir.

Q. And what did you ask him about that return?

A. I asked him basically the same information I had asked him about the '66 to '70 returns, what information was provided for the preparation of the return. This return was made out by Mr. Willis who was present at that time and they confirmed basically the same source documents were used for the preparation of that return as was for the returns made out by Mr. Kuras in prior years.

Q Was there anything further about that return you asked him?

A. No. That was primarily it.

Q Okay. Did you have occasion during this interview to ask him anything about insurance policies?

A. Yes, I did.

Q What did you ask him about insurance policies?

A. I asked him about the policy that he had with John Hancock and he confirmed that he had a policy and was insuring the life of his grandson, Peter Russo and that Mr. Gay was paying the yearly premium payments on that policy.

Q Were you aware of any policies he or his wife may have had with the Prudential Insurance Company?

A. Yes, sir.

Q Did you ask him anything about those policies?

A. Yes, sir. I asked him about the policies he had from which he was deriving interest income with Prudential and he stated that he had several policies with Prudential.

He wouldn't take the interest per year but they would be used to either accumulate, - they would be reverted back to the policy or used to reduce the annual premiums due on the policies.

Q Did you ask him about any large expenditures for the years '67 through '71 such as automobiles, boats, vacations, anything of that nature?

A I asked him about those items. I asked specifically about an automobile and he confirmed that in 1969 he purchased an automobile from Hank Bokman Oldsmobile which he paid cash. I asked him what he did with his old car and he said that he sold it to a friend of his for a couple hundred dollars.

Q Did you ask him about the purchase of boats or anything like that?

A Yes, sir.

Q What did he say to that?

A He said he did not.

Q What about vacations?

A I believe he mentioned that he did take a trip to Spain, through East Clinton Business Men's Association, I believe, during one of those years.

Q Do you remember offhand what year it was?

A I believe offhand it was 1969.

Q And what, if anything, did you ask him about any inheritances he may have had?

A. Well, I asked Mr. Gay about the inheritance from the estate of his father, Joseph Gay and he stated to the best of his recollection, when his father died several years ago, he had received an inheritance of approximately $6,000 and that this was, - he explained that his brother Leonard was the executor of the estate and that he, Joseph, had received the proceeds of this estate and through a bank account at the Buffalo Savings Bank.

Q. Did you ask him whether his wife had any inheritances?

A. I did and he explained that his wife received a small inheritance when her parents died which he estimated to be in the forties or fifties, late forties or early fifties.

Q. And what, if anything, did you ask him about personal loans he may have made to friends or family?

A. I asked him in general about the, - if he had any loans to any member of his immediate family and he said that he did not.

Q. How about to friends?

A. He confirmed that there were mortgages outstanding to various people.

Q. Did you ask him anything about the Gay Printing Company?

A. I asked him about the Gay Printing Company, how he handled, - how the finances of Gay Printing were handled and he said that they were maintained through a checking account in the name of Gay Printing. The expenses of the printing company were paid out of that checking account but he also said that he maintained that account or uses that account also for his personal finances, utilities and things like that and that he also deposits into that account, income from sources other than Gay Printing.

Q What, if anything, did you say about personal records relating to stocks and bonds?

A. I asked him if he maintained personal records relating to his investment in securities and common stock and he stated that apart from the broker's statement, which he had given to me at that particular time, he had no personal, - he kept no personal records of his investment in the stock market, securities or common stock.

Q Did you ask him what his investments totalled?

A. I asked him if he had any knowledge or recollection or notation as to how much he had invested in the stock market either at the original cost or fair market value. I believe I mentioned specifically the period at the end of 1971 and he said he had no, - he could not estimate it. I asked him if he could give me an approximation, a round figure and he said he couldn't.

Q. Did you have any conversation with Mr. Gay regarding mutual funds?

A. I asked him about the two mutual funds that he had, the Anchor Growth Fund and Mr. Gay stated that he had acquired that mutual fund back in the early sixties for an initial investment of $1,000 which was pre-paid at that time. During the years he had been acquiring or reinvesting the mutual fund dividends back into that, into the fund. He didn't receive the dividends on a year to year basis. I also asked him about his investment in the Dreyfuss Fund and he said similarly that was a fund which was acquired in the early sixties, again pre-paid in the amount of $10,000 and the dividends on that fund were the same procedure, were reinvested back into the fund rather than being received on a year to year basis.

Q. Did you ask him generally how he paid for the acquisition of his various assets?

A. Yes sir, I did. I made mention of the fact there was one particular purchase of stock. I believe it was in November of 1967 for a purchase of two hundred shares of Niagara Mohawk stock for approximately $4,000 and I advised him that the broker's statement had noted check and I asked him my examination of the checks of Gay

Printing did not show that as a check payable out of Gay Printing. Mr. Gay stated that it must have been a bank draft he used. He stated that he often paid expenditures such as this through bank drafts and he primarily bought the bank drafts at the Buffalo Savings Bank.

Q Did you ask him anything about brokerage accounts?

A. I asked him about brokerage accounts and he stated that he only had two accounts, one at Shields and Company and one at Loeb,Rhoades which had previously, - the Loeb, Rhoades account was a carry over account formerly from Hugh Johnson which was a brokerage concern prior to the time he took over or he changed his account to Loeb, Rhoades.

Q What, if anything did you ask him about how he generally completed his securities transactions?

A. Well, he stated that his security transactions were bought and sold through his brokers, either through Loeb, Rhoades or through Shields and Company and that the purchases and sales of any of his securities would be reflected on those accounts or through those accounts.

Q Did he say anything as to whether he normally held these in the street name of his brokers or his own name?

A. He said that he did not ordinarily hold a stock for any length of time in the street name. When he purchased the securities he would have it delivered and either held by him or his wife personally.

Q. As to savings accounts, did you ask him anything about savings accounts?

A. I asked him about savings accounts, specifically in the Buffalo Savings Bank. He stated that he had several trust accounts there in addition to his regular accounts. One of the trust accounts was in his name as trustee for his father Joseph, and he also had several trust accounts in the names of his daughters Lorraine and Dorothy.

Q. Did you ask him anything as to where the funds for these trust accounts came from?

A. Yes.

Q. What did he say to that?

A. He responded that all the deposits to the trust accounts in the names of his daughters were his funds. Any withdrawals from those accounts were also his funds.

Q. Did you ask him as to what the normal makeup of his deposits were to the accounts?

A. I mentioned to Mr. Gay that there appeared to be substantial deposits of currency into his savings accounts and he told me that occasionaly he would deposit currency. He mentioned, for example, a mortgage payment he received from, I believe, Mr. Bycina had made a mortgage payment of a thousand dollars. He said he recalled that that was one of the deposits. He stated Mr. Toporczyk would also occasionally pay him in cash. He also mentioned that he occasionally cashed a pay-roll check from South Park Electric Company where he worked in 1970 and '71 and that he sometimes deposited the currency from those paychecks.

Q Did you ever have any conversation about any accounts at the Erie County Savings Bank?

A. I asked him about , - he had a savings certificate taken out in 1971 at the Erie County Savings Bank and I asked him where the money came from for the purchase of that account and he stated that at that time he redeemed a U.S. Treasury Note and this was a short term note as opposed to a U.S. Savings Bond which he held. He said he redeemed the treasury note at the bank and through the transaction had purchased the savings certificate at Erie County Savings Bank.

Q Did you ask him about the interest on that treasury note?

A. I did ask him at that time why his tax returns for the years did not show any interest from the U.S. Treasury Note and he, at that time didn't offer an explanation.

Q Did you have any conversation about his mortgage loans?

A. Yes. I asked him specifically how he would issue the proceeds for his various mortgages and he stated it would vary, but primarily the mortgages were issued in the form of Buffalo Savings Bank drafts or bank drafts from the Buffalo Savings Bank. He would occasionally make, as I recall, he occasionally would make a mortgage loan in cash.

Q Did you ask him about any other loans at that time?

A. I asked him specifically if he had any investments in any other individuals, firms or corporations and he stated that he did not.

Q Did you have any conversation with Mr. Gay at that time about municipal bonds?

A. Yes, sir.

Q And what conversation was that?

A. I asked him at that point about the investment he had in municipal securities and he confirmed that he had municipal securities in New York City bonds, in Albany County South Mall bonds and Federal Intermediate Credit Bank bonds, and I asked him, - and he explained to me that he was receiving the interest separately on those bonds from the coupons as they became due. I asked him at that point if he could tell me how much interest he was receiving on those bonds for the years 1970 and '71 and he said he didn't know.

Q Did you ask him about any other investments he or his wife may have had at that time?

A. I asked him if he or his wife had any other investments in municpal securities and he said "no".

Q. Did you have any conversation at the time of this interview about a robbery loss?

A. Yes. I had mentioned to him that his 1969 tax return had showed a deduction for a loss due to a robbery that occurred in his house and from which some damage to the property had occurred. He said he had explained this to Mr. Kuras. That was a basis for the deduction, that the things that were stolen were related by Mr. Gay to Mr. Kuras based on what he considered to be the original cost of the articles and/or their market value at the time they were stolen.

Q. Did you ask him about any real estate investments he may have had other than the mortgages?

A. Yes. He mentioned that he had purchased a vacant lot in West Seneca for which he had paid $3,000.

Q. Did you have any conversation with him at that time about legal expenses?

A. Yes. I asked him about a check which he had paid to the law firm of Condon, Klocke, Ange and Gervase and it was $500 from Gay Printing in 1970, I believe, and Mr. Gay confirmed that he had paid that to that firm for some legal services which they had performed for him.

Q Did you have any conversation with him about any outstanding debts which he may have had or which he may have owed people?

A Yes, sir.

Q And what did he say about that?

A I asked him about if he had any outstanding loans, mortgages or anything like that in his name and he said "no".

Q Did you ask him whether he had a safe deposit box?

A Yes, sir.

Q What did he say about that?

A He said he did. It was maintained at the Clinton Branch of the Marine Midland Trust. He used it primarily for the storage of securities, stocks and other papers. He hadn't used it for cash within the last three years from that time.

Q Did you have any discussion about any insurance proceeds he may have received?

A Yes, sir. I asked him about the accident reimbursement received by his wife Stella and he said that she received approximately $1,800 several years ago and that was handled through an attorney or insurance agent, Crucian Messina.

Q Did you have any conversation with him about his personal living expenses?

A I asked him if he could estimate his personal living expenses and he responded that he provides with $100 a week which she runs the household including family food expenses.

Q And the time of this interview did you ask him to furnish you with any of his records?

A Yes, I did.

Q And what records were those?

A He submitted to me at that time his brokerage records, buy and sell orders, confirmation orders and monthly brokerage statements relating to his transactions through Shields and Company and through Loeb, Rhoades and through Hugh Johnson and Company.

Q And once you got these records, what if anything, did you do with them?

A I photocopied those records.

Q Mr. Quinn, I'm showing you Government Exhibits 113, 114, 115, 116, 117, 118, 119, 120, 121, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136 and 137. Do you recognize those records?

A Yes, sir.

Q What are those?

A Those are the photocopies which I made of the originals which Mr. Gay had given me on February 21st.

Q How do you know those are the same photocopies which you made?

A. They are stamped on the reverse as true copies and the date that I made the copies.

Q. Did you compare those copies with the originals?

A. Yes, sir.

MR. MELLENGER: Your Honor, I would like to move Government Exhibits 113 through 121 and 124 through 137 into evidence.

THE COURT: Mr. Murphy.

MR. MURPHY: I am sorry. They are the Exhibits, Mr. Mellenger, that you have just had the witness identify?

MR. MELLENGER: That is right.

MR. MURPHY: I have no objection.

THE COURT: Mark them in evidence. When we do that let us be in recess now and the marking can be completed and we will continue. We will be in recess until 2:00 o'clock. At that time we will take up the trial again. You may go out with the Marshal.

(Jury escorted from the courtroom.)

(Government Exhibits Numbered 113 through 121, inclusive and respectively, and Government Exhibits Numbered 124 through 137, respectively and inclusive, received in evidence.)

THE COURT: All right. We will be in recess.

(Recess taken at 12:56 p.m.)

* * * * * * * * * * * * * *

PROCEEDINGS: March 30, 1976, 2:00 p.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury present.)

J O H N Q U I N N, a witness called by and in behalf of the Government, having been previously duly sworn, resumed the witness stand and testified further as follows:

DIRECT EXAMINATION BY MR. MELLENGER (Resumed):

MR. MELLENGER: Your Honor, it has come to my attention I neglected to move Exhibit 123 in evidence before we broke for recess.

THE COURT: It is similar to the others?

MR. MURPHY: I have no objection.

THE COURT: It may be marked.

(Government Exhibit Number 123 received in evidence.)

BY MR. MELLENGER:

Q Mr. Quinn, when we concluded before lunch, we had identified certain photocopies of records which you had made of Mr. Gay's. After you had received these records from Mr. Gay on February 21st, I believe it was - -

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Did you have any other conversation with him at that time?

A. Not at that time, no, sir.

Q. Did you ever see Mr. Gay after that?

A. Yes, sir.

Q. And when was that?

A. It was May 8, 1973.

Q. And did you have occasion to conduct an interview with him at that time?

A. Yes, sir.

Q. And did you reduce this interview to a memorandum form?

A. Yes, sir.

Q. And how soon after the interview did you reduce it to memorandum form?

A. Immediately after.

Q. And after you made up this memorandum, did you read it over?

A. Yes, sir.

Q. And was it correct at the time you read it?

A. Yes, sir.

Q. I show you Government Exhibit Number, - Court Exhibit Number 11 marked for identification and ask you to take a look at that.

A. Yes, sir. That's my memorandum.

Q. All right. That would be the May 8th, 1973 meeting?

A. Yes, sir.

Q. Where was that meeting held?

A. Again it was held in the Intelligence Division office at the Federal Building on West Huron Street.

Q. And who was present at that time?

A. At that time, again it was Mr. Gay, Mr. Willis, Revenue Agent Eugene Scamurra and myself.

Q. Okay, and is that the time you returned the statement you had previously taken from Mr. Gay?

A. Yes.

Q. And what, if anything, did you say to him after you returned the statement?

A. Well, I asked him at that point if he could go to some specifics about the purchase of the treasury note which we had talked about the last time, the $10,000 treasury note. Mr. Gay went on to explain that at or about the time of the robbery which occurred on December 17th of 1969, that his wife had informed him that she had kept a substantial amount of money in a mattress and that the, - because of the burglary, Mr. Gay stated that he felt he didn't want to keep this kind of money around the house so he took all or part of the money to a Federal Reserve Bank, the Federal Reserve Bank Building on Delaware Avenue and purchased a 7 per cent $10,000 six month U.S. Treasury Note.

Q Did you ask him how much money his wife had found in the mattress?

A. I asked him and he said it was - -

MR. MURPHY: Your Honor, I object to finding in the mattress. I assume she knew it was there all along.

THE COURT: I think that is presumed from what had gone before. All right, go ahead, Mr. Mellenger.

BY MR. MELLENGER:

Q Well, what did he say about this money in the mattress?

A. I asked him exactly how much was involved and he said it was $10,000, approximately $10,000 but not more than $11,000.

Q And did he say as to whether his wife had kept this money in the mattress or found it in the mattress?

A. He said she had kept it in the mattress .

Q And this was the money he used to purchase the treasury note with?

A. Yes, sir.

Q. Did you ask him whether he owned any other treasury notes?

A. I asked him about that and he said that that was the only such treasury note that he ever did own. He in turn took the treasury note, he went on to explain that in 1971, - I asked him specifically if he could recall when he purchased the treasury note, drawing his attention to the fact that the robbery had occurred in late December, mid-December of 1969. He said he couldn't be sure of when exactly he did buy the treasury note. It could have been before 1969 or after the end of 1969, maybe 1970.

Q. Did he tell you how long he held this note?

A. He said he held the note until March of 1971 when he took the note to the Erie County Savings Bank and redeemed it and with the proceeds opened a $10,000 savings certificate at the Erie County Savings Bank. There was no actual money involved in the purchase of the new note or of the savings certificate.

Q. The redemption of the savings, - the note for the savings certificate?

A. That's right.

Q. Did you ask him about the reporting of any interest from this treasury note on his tax return?

J. Quinn, for Government, Direct.

A. Yes, I did.

Q. What did he say about that?

A. He said he didn't report it probably because he didn't receive an interest statement on the interest. I also asked Mr. Willis who was present if Mr. Gay had informed him about any interest accrued or received on that treasury note and Mr. Willis stated that he did not.

Q. Did you ask him anything about investment in a Federal Intermediate Credit Bank Bond?

A. I mentioned the $80,000 Federal Intermediate Credit Bank Bond and I asked him again why there was no interest reported on his 1970 or 1971 Federal Income Tax Return and Mr. Gay stated that he was under the impression that the interest from that particular issue was tax free. He said he was told this by the people that sold him the security. He said he did hold that particular bond and all of the municipal bonds throughout the year 1970 and 1971.

Q. Did you ask him anything about U.S. Savings Bonds?

A. I mentioned the series "E" bonds which he had purchased during the 1940's and he said it was approximately $10,000 or less but he didn't know exactly how much it was and he stated that he never had redeemed or cashed in any of these particular bonds.

Q. Did you go into the inheritance he had received from his father's estate, any further at this time?

A. Yes, sir.

Q. And what did you ask him about that?

A. In regard to our discussion in the past, our prior discussion, I showed Mr. Gay a transcript of a Buffalo Savings Bank savings account in his name as trustee for his father and I mentioned to him the fact that there were only two deposits into that account, one for $1,046 and another for $380.

Q. I show you Government's Exhibit Number 39 marked for identification. Do you recognize that?

A. Yes, sir.

Q. What is that?

A. This is a transcript of the Account 809654 at the Buffalo Savings Bank in the name of Joseph Gay as trustee for Joseph Gay, his father Joseph Gay.

Q. That is the same transcript which you showed him?

A. That is the same transcript, right.

Q. Did he say anything else about his father's estate?

A. Well, I asked him why there was only two deposits and he stated that this particular transaction with this account probably involved a distribution on the estate or a distribution on the death of one of his brothers. He stated, - he mentioned Frank Gay or Florian Gay as the brother. He said that when his father died several years ago he received a check for $1,500 from his brother Leonard Gaj who was the executor of the father's estate and that he deposited that $1,500 check into one of his other accounts at the Buffalo Savings Bank.

Q. Okay. Did he say when he deposited that?

A. No, he didn't mention specifically when the deposit was made.

Q. Did you ask him anything about any interest income he may have had from F. Wisolek?

A. I mentioned the fact that Mr. Gay had reported interest income in 1966 and 1967 from a Mr. F. Wisolek and I asked him what the, - what was involved in that interest income and he said that that was a personal note of $3,000 which he had loaned to Mr. Wisolek who at that time had owned a lounge on Clinton Street.

Q. Did he say it was a, - did he distinguish that as a note or a mortgage?

A. He said it was a personal note and not a mortgage. He said that Mr. Wisolek, to Mr. Gay's recollection, paid off the outstanding balance of the note in either 1967 or 1968.

Q. Did you ask him anything about his mortgage loans, repayments he received on the mortgage loans he had outstanding?

A. Well, Mr. Gay, at that point, stated that he had been receiving repayments on principal notes, principals of the mortgages during the years 1967 through 1971 and he requested that I consider those. He listed, he read off to me a list which included the mortgages which he had outstanding at that time and what he had determined to be the amount of principal repaid by the borrowers to him during the years 1967 through 1971.

Q Okay, and did you reduce that to writing in your memorandum?

A. Yes. I made a note of the names and the amounts as Mr. Gay had related to me.

Q Do you remember what the names and amounts were?

A. Yes. The name, - he mentioned Toporczyk, $2,700; Wisolek, $3,000; Mazur, $7,600; Kaczmarek, $307; Bycina, $2,305; Kocol, $2,100; Tokarczyk, $1,500; Peter Wisniewski, $3,911 relating to 1787 Clinton Street and Gertrude Wisniewski, $1,200 relating to property at Cable and Casimir.

Q Okay. I notice you mentioned a Tokarczyk twice?

A. I am sorry. One was Toporczyk, T-o-p-o-r-c-z-y-k and the other was Tokarczyk.

Q Did you ask him anything else at the time of this interview?

A. I asked him about sub-contracting expense which he had claimed each year on his tax return regarding the operation of Gay Printing and Mr. Gay said that when he received an order which he considered to be too big, he sub-contracted it out to another printer and that he had paid the sub-contracting expenses in cash.

Q Did you ever meet Mr. Gay on any other occasion?

A No, sir.

Q So these were the only two interviews you ever had with Mr. Gay, is that correct?

A Yes, sir.

Q Did you conduct any other investigation other than interviewing the defendant, Mr. Gay?

A As part of my investigation I made contacts to verify the computations which I had made during the investigation and to attempt to verify taxable and non-taxable income, some of which statements Mr. Gay had made to me as to where he did receive his income, if non-taxable income during that period.

Q And what attempts did you make to verify the statements which he made as to his non-taxable income?

A Well, I contacted Mr. Messina regarding the claim that Mr. Gay had received some insurance proceeds on an accident. Through contact with Mr. Messina, he stated that, - he told me in effect that - -

MR. MURPHY: I object to this, your Honor. It is hearsay.

MR. MELLENGER: It is - -

THE COURT: Please?

MR. MELLENGER: I will withdraw the question as to what Mr. Messina said.

THE COURT: All right.

BY MR. MELLENGER:

Q He stated he had received some insurance proceeds from the robbery, did he not?

A. His 1969 tax return showed that in addition to the total loss, the fact that he had received insurance reimbursments of $1,394.

Q Did you verify this?

A. Yes, sir.

Q And as to the inheritances he claimed from his father's and brother's, did you make an attempt to verify this?

A. Yes. I talked to Leonard Gaj, Mr. Gay's brother who handled the estate of his father and the distributions through the death of Mr. Gay's brother.

Q Did you attempt to find out whether the defendant had sold any stock other than that as reported on his tax returns?

A. Yes, sir. I contacted the transfer agents who hold the account ledger cards for all stock and all the holdings that Mr. Gay had and my contacts disclosed that there were no sales of stock which weren't reported by Mr. Gay.

MR. MURPHY: I object to this. This is all hearsay.

THE COURT: Is this a conversation with Mr. Gay?

THE WITNESS: No sir, it is not.

THE COURT: With whom, his brother?

THE WITNESS: No. These are contacts which I made with the transfer agents for the stock.

THE COURT: I will sustain the objection.

MR. MELLENGER: Your Honor, can I request a sidebar conference?

THE COURT: Mr. Quinn can not testify about that.

MR. MELLENGER: Your Honor, as part of the expenditures theory of proof part of the proof the Government has to present is the fact that the agent had investigated possible other non-taxable sources.

THE COURT: All right. Very well. You are right, Mr. Mellenger. I will permit it on that. These are negatives?

MR. MELLENGER: Yes.

THE COURT: All right.

BY MR. MELLENGER:

Q You contacted the stock transfer agents of the known holdings of Mr. Gay, did you not?

A Yes, sir.

Q And did you find anything out as to possible sale of securities other than as reported on the return?

A Yes.

Q And what did you find out?

A There were no sales of securities that I could find that were not as reported by Mr. Gay on his tax returns for the years 1967 through 1971.

Q Did you search for any other bank accounts or mortgage loans or anything of that nature?

A Yes, sir.

Q And what were you able to determine there?

A There were no unknown bank accounts. There were no loans or mortgages outstanding by Mr. Gay.

Q How did you determine this?

A Contact through area banks, mortgages would have been recorded at the County Clerk's office as a matter of public record and there were no such loans.

Q Did you perform any analysis on his bank accounts as to deposit slips or withdrawals?

A I requested, as part of my investigation, deposit slips to determine what type of income was being deposited into Mr. Gay's various bank accounts.

Q Did you determine what type this was?

A There were various types of deposits made, check payments, dividends, occasional currency deposits, insurance reimbursement was deposited, the $1,500 check from his father's estate was deposited.

Q Did you make any attempt to determine whether Mr. Gay had received any other inheritances or gifts during this period that he had not told you about?

A I can't recall now.

MR. MELLENGER: I have no further questions, your Honor.

THE COURT: All right. Can we take a break and have this man from New York come in and then we can have Mr. Quinn on cross examination.

MR. MURPHY: Yes, your Honor.

THE COURT: Thank you, Mr. Murphy. Mr. Quinn, if you will stand by, we will have this other witness and have you back.

THE WITNESS: Yes, your Honor.

* * * * * * * * * * *

MELVYN PANZER (16 Ensign Drive, Massapequa, Long Island, New York), a witness called by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MELLENGER:

Q Mr. Panzer, where are you employed?

A Loeb, Rhoades and Company.

Q And how long have you been employed there?

A Twenty-three years.

Q And what is your position?

A I am the assistant manager of the Margin Department.

Q Pursuant to a subpoena, did Loeb,Rhoades and Company furnish the Government with certain records pertaining to Joseph and/or Stella Gay?

A Yes, they did.

Q I show you Government Exhibit 150, 151 and 152 marked for identification. Now, as assistant manager of the Margin Department, are you the custodian of those records?

A Yes, I am.

Q And are those records made and maintained in the regular course of business?

A Yes, they are.

Q I notice those are microfilm copies. What is the availability of the originals of those?

A After they are microfilmed, the original is destroyed.

MR. MELLENGER: Your Honor, I move Government's Exhibits 150, 151 and 152 into evidence.

MR. MURPHY: I have no objection.

THE COURT: All right. Mark them in evidence.

(Government Exhibits Numbered 150, 151 and 152 received in evidence.)

BY MR. MELLENGER:

Q I call your attention to Government Exhibit Number 150. Will you identify that, please?

A That is our monthly statement for the account of Joseph and Stella Gay.

Q And what address?

A Also a new account report. 3 Fredro Street, Buffalo, New York.

Q Excuse me. Also what is included there?

A A new account report.

THE COURT: What was the name of the street?

THE WITNESS: 3 Fredro Street.

THE COURT: All right, fine.

BY MR. MELLENGER:

Q. From looking at that, can you tell when that account was opened?

A. The new account report, May 11, 1970.

Q. And what information is contained in the ledger copy of that Exhibit?

A. Various purchases, receipt of funds and shipment of securities.

Q. Would you outline the transactions in that account from the day it was opened on May 11, 1970 until December 31, 1971?

A. First transaction on May 7, 1970, purchase 10,000 General Acceptance, 10 quarters of 90 at par, total cost, ten thousand o ninety-six eighty one.

Q. Does that indicate how that was paid for?

A. Yes. Check was received on May 21, 1970 from the Buffalo Savings Bank. In addition they bought on May 22, 400 shares of Niagara Mohawk Power at fifteen and three quarters. Check was received on May 22nd from the Marine Midland Trust in payment for it.

Q. Okay. Is there any other transactions in that account?

A. On June 4th the 10,000 General Acceptance Bonds were shipped out to the customer and on June 9th the 200 shares of Niagara Mohawk were shipped to the customer.

Q. I call your attention to Government's Exhibit Number 151.

I ask you to identify that, please.

A. These are monthly statements for Joseph J. Gay, 3 Fredro Street, Buffalo, New York, and the new account report.

Q. Does the new account report indicate what date that account was opened?

A. Yes. February 7, 1969.

Q. Okay, and from the date that account was opened, February 7, 1969 until December 31, 1971, what activity took place in that account?

A. First transaction took place on February 14, 1969, a purchase of a hundred General Motors at seventy-nine and seven eighths, total cost $8,034.49.

Q. And how was that paid for?

A. Check was received for that amount on February 13th. That came from Buffalo Savings Bank. Next transaction on March 25, 1969, bought 100 Niagara Mohawk Power, twenty and three quarters, total cost, twenty-one c two seventy-five. Check was received on March 25th for that amount. On April 22, 1969, 100 shares of Niagara Mohawk was shipped to the customer. On April 29th a hundred General Motors was shipped to the customer. June 11th, sale of 200 Allied Aero Industries as five and seven eighths; net proceeds of $1,144.24. Stock was received on June 11th and a check for that amount was remitted to the client. On August 11, 1969, purchase of 500 Niagara Mohawk Power at eighteen and a quarter, total cost ninety two fifty one twenty-five. Same date, bought 200 Phillips Petroleum, twenty-seven and seven eighths; total cost, fifty-six forty eighty eight. Check was received on August 11th for fourteen thousand eight ninety-two thirteen in payment for those two purchases. On August 18th, 200 shares of Phillips Petroleum were shipped to the client. On 8-26, 500 Niagara Mohawk Power, shipped to the customer. On March 3, 1971, purchase 10,000 Fruehauf Finance, seven halves of seventy-eight at 99.74, total cost ten thousand one seventeen seventy-five. On March 12th a check was received from the client for that amount. On March 30, 1971 the 10,000 Fruehauf Bonds were shipped to the client.

Q I am showing you Government's Exhibit Number 152 marked for identification. Would you identify that, please?

A. These are monthly statements for Mrs. Stella Gay, 3 Fredro Street, Buffalo.

Q When was that account opened?

A. New account report indicates it opened on March 18th,'69.

Q From date of opening, March 18th, '69 through December 31, 1971, what transactions are reflected on that ledger copy?

A. On March 25, '69 bought a hundred Niagara Mohawk Power at twenty and seven eighths, total cost, twenty-one thirteen thirty-eight. Check was received for that amount on March 25th. On April 21, '69 a hundred shares of Niagara Mohawk Power were shipped to the client. On April 23, bought a hundred Phillips Petroleum at seventy-one and five eighths, total cost, seventy-two o eight sixty-six. Check was received from Buffalo Savings Bank on April 23rd for that amount. On May 2, '69, 500 shares of Phillips Petroleum were shipped to the customer. On August 11th, 500 Niagara Mohawk Power was purchased at eighteen and a quarter for ninty two fifty-one twenty-five. Same date bought 200 Phillips Petroleum at twenty-seven and seven eighths, total cost, fifty-six forty point eighty-eight. On August 11th a check was received for that amount covering the two purchases.

Q. What was the amount of the two purchases?

A. Total, fourteen thousand eight ninety-two point thirteen, and on August 18th, 200 Phillips Petroleum was shipped to client. August 26th, 500 Niagara Mohawk Power was shipped to the customer. March 3, '71, bought 10,000 Fruehauf Finance, seven halves of seventy-eight at 99.74. Total cost, ten thousand, one seventeen point seventy-five. On March 12, a check was received for that amount. On March 30th the 10,000 Fruehauf Finance Bonds were shipped to the client.

Q. Those are all the transactions for those accounts from the date of opening through December 31, 1971?

A. Yes, they are.

MR. MELLENGER: I have no further questions.

THE COURT: Mr. Murphy.

CROSS EXAMINATION BY MR. MURPHY:

Q. Now, sir, is there a Mr. Stevenson working for your company?

A. He used to work for our company.

Q. He used to work for your company?

A. Yes, sir.

Q. And do you know whether or not he was the salesman who sold these particular investments to Mr. Gay?

A. Yes, he was.

Q. All right. Now, you indicated, sir, that checks were received by the company for payment for these particular investments, is that right?

A. Yes, sir.

Q. And one you indicated was Buffalo Savings Bank?

A. Yes, sir.

Q. And can you tell me, sir, who the others were, where the other checks came from?

A. I think one was from Marine Midland. Not all the checks are identified.

Q. I see, but the one from Buffalo Savings Bank is identified?

A. Yes.

Q. There is no photostat of the check, of course. It is just that it is a Buffalo Savings Bank check?

A. Correct.

Q. All right, and would it be possible, sir, - I am sorry. Could it be that Buffalo Savings Bank checks were received and not noted?

A. Correct, sir.

MR. MURPHY: All right. Thank you. That is all.

THE COURT: All right. Nothing further?

MR. MELLENGER: Nothing further of this witness, your Honor.

THE COURT: Thank you.

MR. MELLENGER: Your Honor, would you like Mr. Quinn back at this time or the next witness?

THE COURT: We might as well have Mr. Quinn back unless the man is from out of town.

MR. MELLENGER: No. That was the last out of town witness, your Honor.

THE COURT: All right. Have Mr. Quinn come back.

* * * * * * * * * * * *

JOHN QUINN, a witness called by and in behalf of the Government, having been previously duly sworn, resumed the witness stand and testified further as follows:

CROSS EXAMINATION BY MR. MURPHY:

MR. MURPHY: May I have the 1965 and 1968 returns?

MR MELLENGER: Sure.

MR. MURPHY: I assume these are now in evidence?

MR. MELLENGER: No, they are not. We can move them.

MR. MURPHY: I understand, your Honor, that we have signed a stipulation with regard to them.

THE COURT: Should the stipulation be read before we continue with the cross examination of Mr. Quinn?

MR. MURPHY: Not necessarily.

MR. MELLENGER: I don't think it is necessary because all these returns have been identified through testimony of the revenue agents.

MR. MURPHY: I stipulated that anybody from Andover, your Honor, would testify that these are the returns that would be received.

THE COURT: All right.

MR. MELLENGER: I think I would move Exhibits

2 through 8 in evidence.

THE COURT: If those are the returns, mark them in evidence.

(Government Exhibits Numbered 2 through 8, respectively and inclusive, received in evidence.)

BY MR. MURPHY:

Q Mr. Quinn, you did utilize the 1965 and 1967 returns of the defendant in your investigation, didn't you?

A Yes, sir.

Q And in the 1965 return, did you not notice that Bell and Howell stock was sold?

A Yes, sir.

Q And in the 1967 return, did you not notice that Bell and Howell stock was sold?

A Specifically, if I could look at the returns.

Q Certainly. Here it is. I believe it is Exhibit Number 2.

A Yes, sir.

Q And that was sold?

A Yes, sir.

Q Now, you didn't tell us about checking into any holdings, any holding company for Bell and Howell.

A. That was part of my contact with the transfer agents, sir.

Q. What transfer agent?

A. Bell and Howell, I believe, was handled through a bank in Chicago, Illinois.

Q. Well, now you told us that you checked with transfer agents. Just all transfer agents in the whole country?

A. Of all the transfer agents that Mr Gay held stock.

Q. Well, Bell and Howell was not part of the stock that he was presently holding at the time that you interviewed, was he?

A. In 1973?

Q. Yes.

A. No. He had sold the Bell and Howell prior to that, yes sir.

Q. Now, tell me then what transfer agent did you check with in Chicago?

A. I believe it was the Chicago National Bank. I am not quite sure of the name of the bank, but I believe it was the Chicago National Bank which is transfer agent for Bell and Howell Corporation.

Q. Don't your records reflect that, sir?

A. The contacts that I had made, I had sent a letter - -

Q. Please, do your records reflect as to who you contacted as being the transfer agent for Bell and Howell

Corporation or the Bell and Howell investments that Mr. Gay sold both in '65 and '67?

A. My records would reflect the person that we contacted as stock transfer agent for Bell and Howell, yes sir.

Q. All right. Now, do you have those records here with you?

A. No, sir.

Q. And you are just, - now you really don't know then and you can't testify under oath as to who you contacted, isn't that right?

A. I don't know the name of the gentleman. As a matter of fact, now that I recall, it was handled through our office in Chicago who actually contacted the bank.

Q. So then, if it was handled by your office and not by you, somebody else in Chicago handled the situation for you, is that right?

A. An agent in Chicago contacted the transfer - -

Q. Please, please. Somebody else contacted the transferor or the transfer agent for you, isn't that true? So then you come in here and testify not what the transfer agent said to you, but what the transfer agent said to somebody else who then said it to you, is that it?

A. Well, I was concerned with documentation from the transfer - -

Q. Please.

THE COURT: Mr. Murphy, again, the purpose of the agent, - one of the things the Government must show, is that they have to track down, in these cases, all leads to make sure if there is any information favorable, -for example, a loss, - to a taxpayer that the documents are discovered so one of the reasons, if Mr. Quinn has reason to believe that a transfer agent or some other person may have information, then it is up to him, it is his obligation to attempt to get that information. He may do that personally. He may do it by letter or he may do it by calling upon another man holding a position similar to his in Chicago, Los Angeles, San Francisco and saying "Please check on this and that and send on to me whatever information you get" and then when he gets it, he makes a determination of what other steps he has to do to complete his investigation so that is why he testified about this search. The rules here are a little different. I mean here, if the information isn't negative, then he can't bring in a record of a negative. If the search revealed that there was a document which might have had some bearing upon the events that occurred at a particular time, then we ought to have the document here or a copy of it, but, Mr. Murphy, he can tell us what the agent, - what information the agent sent on to him and then if we should have greater documentation, then we will make a determination of what to do, either rule out the evidence or permit it with an appropriate instruction.

BY MR. MURPHY:

Q All right. Mr. Quinn, what did the agent reveal to you?

A The agent informed me that the records of the stock transfer agent disclosed that in effect, or in fact, Mr. Gay, in 1967 did sell 200 shares of Bell and Howell stock as he had reported on his 1967 tax return.

Q All right. Now, did it also indicate that there was a sale of Bell and Howell stock in the year 1965?

A May I look at the '65 return, sir? I believe that the records that were forwarded to me or the information verified the fact that there was a sale in 1965 of Bell and Howell stock.

Q All right. Now, these particular records, sir, that were forwarded to you, they show a sale of stock, is that correct?

A. They would show that the holdings of stock were no longer maintained by the stock transfer agent as Mr. Gay's holdings.

Q Well, just that particular amount, did he wipe out his account?

A. On the 1965 sale, he did not.

Q Now, are you testifying, sir, from your recollection of the correspondence you received from another agent or are you testifying from the tax returns?

A. I am testifying that the records sent to me at the time that I received them, or the information sent to me verified the transactions listed by Mr. Gay on the tax returns.

Q Only those particular transactions, is that right?

A. As to sale of stock, yes sir.

Q Sale, all right. Now, wouldn't you be interested, sir, in the purchase of stock?

A. Yes.

Q How much was purchased and how much he held?

A. Yes, sir.

Q All right. Did you get that information?

A. Through the records submitted by Shields and Company, Loeb, Rhoades, Hugh Johnson and Mr. Gay himself, I attempted to ascertain all of his purchases of stock, yes, sir.

Q No, no. I am talking, - let's confine ourselves to Bell and Howell and the information you got from the Chicago transfer agent.

A. The Chicago transfer agent would not have any, - they would have a record of when Mr. Gay acquired the stock.

Q They would have a record of what he purchased it for, would they not?

A. No, sir.

Q Not how much he purchased it for?

A. No, sir.

Q Only that he owned the stock?

A. Yes, sir.

Q All right.

A. The stock transfer agent has no records relating to the purchase price of the stock.

Q Is that true of all the stock transfer agents that you contacted, sir?

A. To the best of my recollection, I did not receive any documents or information from any stock transfer agent that indicated a purchase price.

Q That is true of all of them that you contacted?

A. To the best of my recollection.

Q Now, you are aware, sir, that numerous, or a number of stock transfer agents have testified in this case and that their records are in this case and that you had access to these records?

A. Yes, sir.

Q All right. Now, let's take the '65 return here. Does it show a capital gain with regard to the Bell and Howell?

A. No, sir, no sir. It shows a loss.

Q It shows a loss. All right. How about the '67 return?

A. That shows a gain.

Q That shows a gain. Is it a long term or a short term capital gain?

A. That is a long term capital gain.

Q Now, you would be interested, would you not, in the amount of stock that was purchased, isn't that true?

A. Yes, sir.

Q And the purchase price of the stock, isn't that right?

A. Yes, sir.

Q All right. Now, the gain is over and above what the individual sells the stock or purchased the stock for, isn't that right?

A. That's right.

Q So then you have to give him credit for the original purchase price as being returned to him, isn't that true?

A. That's true.

Q. And of course, in all your calculations, through Mr. Gay's accounts and various expenditures, you did that, is that right?

A. Yes, sir.

Q. All right. Now, you indicated that you had an interview,- you did interview Mr. Gay's brother, is that true?

A. Yes, sir.

Q. Didn't you, sir, tell Mr. Leonard Gaj that you weren't interested in anything that occurred with his father's estate, prior to the year 1969; didn't you tell him that at one time?

A. No, sir.

Q. Sir, you just talked to him or you were in the presence of Mr. Mellenger when he spoke to you on yesterday, isn't that right?

A. Yes sir, it was.

Q. And isn't it a fact he had indicated to you he had not told you of an expenditure from his father's estate prior to the year 1969?

A. Could you rephrase that?

Q. Isn't it a fact that Mr. Leonard Gaj yesterday indicated to Mr. Mellenger that he had not told you of a disbursement to Mr. Joseph Gay from the father's estate prior to the year 1969 because you had told him that you weren't interested in anything prior to 1969?

A. He said that, yes sir.

Q. And didn't you at that time say "you are right"?

A. No, sir.

Q. Now, when you first got the investigation, wasn't it from the year '69 through '71?

A. When I first got the investigation assigned to me?

Q. Yes, yes.

A. I believe the year 1971 was assigned to me as part of the investigation.

Q. All right. Now, didn't '67 come in, '67 and '68 come in at a later point in this investigation?

A. I am not sure, Mr. Murphy, when I undertook an investigation for '67 and '68.

Q. All right, but it did not originally start out as '67 through '71, isn't that true?

A. No sir, it did not.

Q. It started out originally as '68 through '71, - I am sorry, '69 through '71?

A. I don't believe, - I don't recall whether 1971 was originally assigned.

Q. All right. Now, much of the information, - not much, but some of the information you had at your disposal at your first interview with Mr. Gay, was information that had been related to you through the use of memorandum of interviews made out by other revenue agents, isn't that true?

A. Special agents, yes sir.

Q. All right. Now, did you in fact, sir, go and interview the various mortgagees that Mr. Gay had indicated to you that he had made these payments to or given mortgages to?

A. Did I interview them, sir?

Q. Yes.

A. Not all of them, no sir.

Q. Did you interview any of them?

A. Yes, sir.

Q. All right. Did you ask during the course of that interview how the payment of the monies which they received, had been made?

A. Yes, sir.

Q. All right. Now, with regard to the individuals that you did, in fact, interview did you speak to a Mr. Bycina?

A. No, sir.

Q. All right. Your records did reflect, did they not, that he had received a $10,000 mortgage from Mr. Gay?

A. I am not sure of the exact amount but he did have a mortgage outstanding from Mr. Gay, yes sir.

Q. Well, I am sorry, sir. Didn't you testify on direct examination of interviews with Mr. Gay?

A. Yes, sir.

Q. And were you not asked what Mr. Gay said to you and you were able to tell us almost verbatim, isn't that right?

A. Mr. Gay told me at that time that during the years 1967 through 1971 he had received a certain amount of principal repayments from these persons.

Q. All right.

A. As to how much the original mortgage was, without looking at the specific records, I really couldn't recall.

Q. Well, can't you, - you utilized these particular records, did you not?

A. Yes sir, I did.

Q. And you are not prepared to testify now without them, is that it?

A. As to the specific amounts?

Q. Yes.

A. And dates of initial mortgage?

Q. Yes.

A. No, I am not.

Q. But you were able to testify without any problem whatsoever as to the specific amounts of payment that were made to Mr. Gay through the years '67 and '71?

A. I was able to testify that from my memorandum, yes sir.

Q. In other words,you were reading your memorandum at the time you were testifying.

A. As to the amounts and names of the mortgage repayments as related to me by Mr. Gay, yes sir.

Q. All right, so that your recollection of the conversations that you had with Mr. Gay is contained in your memorandum and as I would understand it, you have no specific recollection of what he told you other than what you wrote down, is that it?

A. That's essentially true, yes sir.

Q. Essentially true, and also would be essentially true as to the other information that you received in your investigation in this particular case would be that the other memorandums of other special agents with Mr. Gay prior to your entering the case became basis for your investigation, is it true?

A. As to the statements made as part of that memorandum, yes sir.

Q. All right. Now, isn't it a fact that one of the previous interviews with Mr. Gay which became a memorandum of one of the agents, took place in the back room of a bar room?

MR. MELLENGER: I'm going to object, your Honor. He has no personal knowledge of that.

THE COURT: Well - -

MR. MELLENGER: We have had Mr. Krysztof in to testify at to that.

THE COURT: It may lead to something but, of course, Mr. Quinn wasn't there so he could not tell us one way or the other what happened if he was not there.

BY MR. MURPHY:

Q Mr. Quinn, did you rely, - you did in fact rely on the memorandums of previous interviews, one of which was by Mr. Krysztof, isn't that correct?

A As to the statements that were made as part of the memorandum, yes sir.

Q All right. Did you ever bother to concern yourself as to where the particular interview took place?

A No, sir.

Q You didn't?

A To concern myself with it, sir?

Q Yes. Did you ever inquire of Mr. Krysztof where these interviews took place?

A No, sir.

Q Now, it is not usual, Mr. Quinn, is it to conduct an interview of a prospective target of a criminal investigation in the back room of a bar room, is it?

A Usual?

Q Yes.

A. It is not. It doesn't happen very often, Mr. Murphy.

Q All right. The agent would prefer to conduct the interview someplace else, isnt' that true?

A. Yes, sir.

Q All right. Now, with regard to the information that you asked of Mr. Gay, you were concerned, were you not, with possible sources of income, isn't that true?

A. Yes, sir.

Q Now, when you went through with Mr. Gay his sources of income, he had provided, had he not, at this point, all of the material from Gay Printing, isn't that right?

A. The cancelled checks, the bank statements and the receipt book, yes sir.

Q His receipt book?

A. Yes, sir.

Q All right. He provided you with all the records that he had from his stock brokerage firm?

A. Yes, sir.

Q Is that true?

A. Yes, sir.

Q You checked all these out, isn't that right?

A. Yes, sir.

Q Nothing has been hidden from you, had it?

A. No, sir.

Q All right. Now we get down to a $120 item which Mr. Gay overlooked in his tax return, isn't that true?

A. Yes, sir.

Q. And that would be the interest payment from diversified - -

A. Selective enterprises.

Q. I am sorry, selective enterprises, isn't that right?

A. Yes, sir.

Q. But he did indicate on his tax return something with regard to selective enterprises, isn't that right?

A. I don't believe so.

Q. All right, but that became no problem for you? Didn't he tell you that was the proceed of a $2,000 loan, that $120 interest payment?

A. I believe he did, yes sir.

Q. All right. He came out and admitted it and it was omitted. He claimed it to be an oversight from his tax, isn't that true, the $120 interest payment that wasn't declared on his taxes and he claimed it to be an oversight, isn't that right?

A. I believe he did, yes sir.

Q. All right. His bank account; did you ever ask him for his bank accounts, sir?

A. No, sir.

Q. All right. You did, did you not, check all of the banks in the area?

A. Yes, sir.

Q And you came up with numerous, - he did tell you about savings accounts that were in the Big E, - I am sorry, Buffalo Savings Bank?

A. We discussed the accounts, yes sir.

Q All right, Marine Trust accounts?

A. Yes sir, we discussed those too.

Q Erie Federal?

A. Yes, sir.

Q Savings accounts?

A. Yes, sir.

Q And the Big E savings certificates?

A. Yes, sir.

Q All right. Now, that savings certificate you were not able to determine, were you not, that that was in fact purchased by the proceeds of a Federal Bond, were you?

A. I was not able to determine that, yes sir.

Q All right. Now, you did check with the Big E, did you not?

A. Yes, sir.

Q You also checked with the Federal Agency that issued the bond, isn't that true?

A. Federal Reserve Bank, yes sir.

Q All right. Now, did you ever bother to ask Mr. Gay for a record, if he had any records with regard to that?

A. To the treasury note, sir?

Q. Yes.

A. I just took his word. I assumed it was as he stated.

Q. Well, you checked it out?

A. I attempted to verify it through the bank, yes sir.

Q. And you couldn't verify it through the bank, could you?

A. No, sir.

Q. And you couldn't verify it through the Federal Government, could you?

A. No, sir.

Q. They had no records whatsoever of it, isn't that right?

A. The Federal Reserve told me without the specifics of the note, they couldn't locate the actual note, no sir.

Q. All right. I want to show you Defendant's Exhibit 16 for identification and which, - I am sorry, 16 in evidence, which has been identified as a receipt from an individual who works for the Erie County Savings Bank which shows that a treasury bill for $10,000 to be deposited in a certificate of deposit. Did you ever bother to ask Mr. Gay for that, to verify this?

A. No, sir.

Q. All right, so you just left that hanging in limbo?

A. No, sir.

Q. Well, you didn't care then?

A. I assumed what he told me was as it occurred.

Q I see. Isn't it true that the basis of your investigation is an assumption that what he told you was the situation and that what he told the other individuals was in fact the situation with regard to his finances?

A I don't understand your question, sir.

Q All right. You started from the year 1967, did you not?

A Yes, sir.

Q All right. Now, did you bother to determine how much money Mr. Gay had saved over his lifetime, prior to the year 1967?

A Yes, sir.

Q How?

A I wrote to the Social Security Administration and asked them to provide me with a record of Mr. Gay's recorded earnings.

Q Recorded earnings?

A Yes, sir.

Q When did Social Security start, sir?

A 1935, I believe.

Q All right. Now, do you know when Mr. Gay started to work?

A According to the records which I received, which is the only thing I base my answer on, approximately 1945.

Q 1945?

A Yes, sir.

Q That is when he started to work?

A. According to the information that I received, yes sir.

Q All right. Now, who did you receive that information from?

A. Social Security Administration.

Q Social Security. Did they inform you as to how old Mr. Gay is?

A. Did they inform me?

Q Yes.

A. No sir, no sir. They did not.

Q Did you bother to ever determine Mr. Gay's age?

A. I believe that Mr. Krysztof had asked Mr. Gay and I had reviewed Mr. Krysztof's memorandum as to his age.

Q All right. What is his age?

A. I don't recall offhand. I believe, - I don't recall offhand, sir.

THE COURT: Mr. Murphy, there is not any argument about his age. I think somebody mentioned it in the opening and you confirmed it in the openings. Why should we have all this about the age? If you want to find his age, it is there but I do not think Mr. Quinn is required to remember every detail of Mr. Gay's life and, frankly, what he made before the year 1967, unless it can be connected up with the years 1967 through 1971, absolutely does not make any difference. The thing that counts is what did he make during the years in question. As I said before, as to some of those computations, it is important but we have documents that can tell us that. Mr. Quinn has given us his recollection of some of the things that Mr. Gay told him. As far as that material is concerned, if there is any quarrel about any of it, where it is wrong, let us go into it and if there is some point to be made about the age I will listen to it but I can not see how that makes any difference to this case. All right. Continue, Mr. Murphy.

BY MR. MURPHY:

Q I am sorry, your Honor. Mr. Quinn, the proposition that you begin with and that Mr. Gay expended more money than he received, is, is it not, that in the year 1967 he received "X" number of dollars and then expended more than that amount of money?

A That's true.

Q All right, and you say or your position is, therefore, that this was income to him, isn't that right?

A. The over expenditure of funds, yes sir.

Q That is income, isn't that true?

A. Yes sir, considering - -

Q Now, please, please.

MR. MELLENGER: Your Honor, I ask the witness be allowed to answer that question.

MR. MURPHY: He did answer it.

THE COURT: I do not know whether he did or he did not, at any rate, put another question but permit the witness to answer the question. Go ahead, Mr. Murphy.

BY MR. MURPHY:

Q Considering what? Do you want to consider something else?

A. The over expenditure would be income considering the non-taxable income he received during that year.

Q Okay. He gets a credit for that, isn't that right?

A. That's true.

Q Then you arrive at a figure which you call unexplained income, isn't that true?

A. Omitted income, yes sir.

Q Omitted income or unexplained income, is that right?

A. Yes, sir.

Q. Now, if that came out of savings that existed prior to the year 1967, why, of course, there would be nothing wrong with that, would there?

A. That's true.

MR. MURPHY: All right. That is all I have.

MR. MELLENGER: May I have one second, your Honor?

THE COURT: We will be in recess now for about 10 minutes, ladies and gentleman, and then resume. You may go out with the Marshal.

(Jury escorted from the courtroom.)

THE COURT: We will be in recess.

(Recess taken at 3:10 p.m.)

* * * * * * * * * * * *

PROCEEDINGS: After recess, 3:20 p.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury present.)

JOHN QUINN, a witness called by and in behalf of the Government, having been previously duly sworn, resumed the witness stand and testified further as follows:

REDIRECT EXAMINATION BY MR. MELLENGER:

Q Special Agent Quinn, Mr. Murphy's last question to you was that if these expenditures during the years '67 through 1971 were traced to savings prior to January 1, 1971, that would not be considered as omitted income, isn't that correct?

A That's true.

Q And did you make any attempt to trace these expenditures to prior savings?

A As to the assets in bank accounts, security holdings, whether they were converted during the subsequent five years, yes sir, I did.

Q And what did you find?

A Other than the stock which was reported as sold by Mr. Gay, there were no conversion of assets held as of the beginning 12-31-66.

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Q You said you contacted the Social Security Administration to find out what his prior earnings were?

A Yes, sir.

Q And you find out or they gave you a record from 1945 until what time?

A Until 1966.

Q Okay.

A Through 1966.

Q What were his earnings from 1945 through 1966?

A As I recall it was approximately $63,000.

MR. MELLENGER: No further questions, your Honor.

RECROSS EXAMINATION BY MR. MURPHY:

Q That would be $63,000 that Social Security was declared on, isn't that right?

A According to the records of Social Security, yes sir.

Q All right. Now, how about commissions as a salesman?

A I can't recall specifically where the money was. There were several employers listed from the Social Security Administration as whom Mr. Gay had worked for over the years.

Q Well, was one of them Chevrolet Corporation during the war years?

A I belive so, yes sir.

Q Well, that would have been in the years '41 and '42, isn't that correct?

A. I'm not sure. As I say, to my recollection the records started as to earnings approximately 1945. It may have been 1943 or '44.

Q. You say approximately '45, is that right?

A. Yes, sir.

Q. All right. Now, would Social Security be paid on commissions as a salesman, sir?

A. I don't know what is with-held or what is reportable as Social Security, Mr. Murphy.

Q. All you know then is you can give us an approximate figure which Social Security gave you, is that it?

A. I can give you the exact figure which Social Security gave me.

Q. But what you have given us up to this point, is nothing more than an approximation, is that right?

A. Social Security stated the total, - the total of the Social Security earnings were sixty-three thousand and I believe $25 or something within that range.

Q. So then you are giving us an approximation, are you not?

A. Yes, sir.

Q. All right. Now, with regard to, - you went to bank accounts, did you say?

A. Yes, sir.

Q. What banks, all of the Buffalo banks?

A Yes, sir.

Q Every one of them or just the ones that Mr. Gay had mentioned?

A Every one of them.

Q Every one of them, all right. That is every one in the Buffalo area?

A Yes, sir.

Q Is that true?

A Yes, sir.

Q All right. Now, how about what securities; just the security people that you had spoken to Mr. Gay about?

A Yes, sir.

Q All right. Now, how about mortgagees?

A I am sorry. I take that back.

Q All right.

A All the security brokers in the area.

Q How about mortgagees who have paid back mortgages that were no longer in existence in 1967?

A We accounted for those, yes sir.

Q You did?

A Yes, sir.

Q By checking with these individuals?

A No.

Q How?

A By checking with the discharged mortgages in the Erie

County Clerk's records.

Q All right. Now, what do you come up with, sir? What did you come up with? How many discharg[illegible]tgages did you find?

A. Offhand, I don't recall, Mr. Murphy. There were mortgages which were paid off by the borrower prior to 1967, yes sir.

Q All right. Now, that would take into account principal and interest, isn't that right?

A. The principal, yes sir.

Q Well, also the interest, isn't that true?

A. I believe the mortgage would show the discharge of the principal amount of the mortgage.

Q Yes, but then there is interest on that which would be income to Mr. Gay, isn't that true?

A. That is true, sir.

Q And could be a source of savings, isn't that right?

A. Yes, sir.

Q How much credit did you give him for that?

A. I don't understand your question, sir.

Q Well, if he gave a mortgage, say for $15,000 that was paid off prior to 1967 and he had that money, right, did you give him any credit for that?

A. Presumably that would have been accounted for through whatever he reported as interest income on his tax returns for the years 1963 through 1966.

Q Well, suppose it had been paid off before '63?

A. In that situation I would have no knowledge of how much interest income he had.

Q All right, and you would have no knowledge also, right, of principal, isn't that right?

A. Well, as to principal the mortgages on file with the County Clerk would have showed the discharge of a mortgage regardless of when it was paid off.

Q Now, did you exhaust all of those?

A. I did what I considered to be a reasonable thorough search of the County Clerk's records, yes sir.

Q All right. Now, how many did you find that were paid off?

A. I can't give you an approximation because - -

Q All right, please. If you can't, fine. Do you know what the principal amounts on them were?

A. At one time I did know, yes sir.

Q All right. How about you know that he made personal loans?

A. Yes, sir.

Q All right, and did you exhaust all personal loans?

A. I had no knowledge of any personal loans which Mr. Gay had other than what he told me about.

Q Well now, that was loans that were in existence as of the time that you were asking him about, isn't that true, the years in question?

A. The loans that were in existence during the years 1967 - -

Q Through - -

A. Through 1971 and in the case of Mr. Wyzella, that would have been prior to 1967 and he informs me of that loan, yes sir.

Q Mr. Wyzella, and that was the $107 per month payment?

A. No, sir.

Q Well, we did have a loan from an individual from the Buffalo Savings Bank who also had a mortgage. You are aware that he made personal loans, isn't that true?

A. I was aware that he made a personal loan to Mr. Mazurowski, yes sir.

Q And that he had received interest on these, isn't that true?

A. After talking to Mr. Mazurowski, yes.

Q All right. These also then would have been a source, right, of monies which would not be considered income except for the interest; return of principal is not income, is it?

A. Return of principal is not income, no sir.

MR. MURPHY: All right. Thank you.

MR. MELLENGER: Nothing further of this witness, your Honor.

THE COURT: Thank you, Mr. Quinn. Next witness, please.

MR. MELLENGER: The Government calls Leonard Gaj.

* * * * * * * * * * * *

LEONARD GAJ (1761 Clinton Street, Buffalo, New York), a witness called by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MELLENGER:

Q Mr. Gaj, are you any relation to Joseph J. Gay?

A That is my brother.

Q Spelled G-a-y?

A G-a-y.

Q Your brother is seated in the courtroom?

A Yes, he is.

Q How about Joseph J. G-a-j?

A That's my father, was my father.

Q And how long has your brother spelled his name G-a-y?

A As far as I can recall.

Q And how long has your father been spelling his name G-a-j?

A. Since he was born in Poland, I imagine.

Q. How close are you with your brother Joseph?

A. Very close.

Q. Do you know his wife Stella at all?

A. Yes, I do.

Q. Okay. Did you ever know her to be gainfully employed in the last ten years?

A. Not to my knowledge.

Q. Did you have a brother by the name of Frank Gaj?

A. Yes, I did.

Q. He is deceased now, isn't he?

A. Yes, he died.

Q. To the best of your recollection, when did your brother Frank die?

A. In 1969.

THE COURT: Excuse me, Mr. Gaj. Was that in 1969?

THE WITNESS: '69.

THE COURT: Thank you.

BY MR. MELLENGER:

Q. Were there any distributions made to your brother Joseph as a result of your brother Frank's death?

A. Yes. There was some distribution made to him.

Q. Do you know what the amount of that distribution was and when it was?

A. I would have to refer to a slip here that I have in front of me, that slip that I gave you yesterday.

Q. Okay. I am showing you - -

THE COURT: Mr. Gaj, was he the administrator or executor of the estate?

BY MR. MELLENGER:

Q. Yes, your Honor. Mr. Gaj, I am showing you what has just been marked as Court Exhibit Number 33 and ask you to take a look at that. Does that look familar to you?

A. Yes, it does.

Q. Is that the note that you were talking about?

A. Yes.

Q. Does that refresh your recollection?

A. Yes.

Q. Okay. How much of a distribution was made to your brother Joseph as a result of your brother Frank's death?

A. $1,046.68.

Q. And when was that?

A. That was in April of 1969 or a few months after that.

Q. Okay, and did you have a brother by the name of Edward Gay?

A. Yes.

Q. And he is deceased also, is he?

A. Right.

Q. And when did he die?

A. August of 1969.

Q. And are you aware of any distributions made to your brother Joseph as a result of your brother Edward's death?

A. Yes. There was $380.34.

Q. Showing you Government's Exhibit 52 and 52-2 and ask you if you recognize those?

A. Yes, I do.

Q. And what is 52?

A. 52 is a transcript of a bank account which was held under Joseph Gay as trustee for Edward Gay and then this account was closed out and transferred to various other accounts for the, - for my father's children.

Q. Okay, and what is Exhibit 52-2?

A. This is a withdrawal slip indicating that this transaction had taken place with my father's signature.

Q. You recognize that to be your father's signature?

A. Yes, I do.

Q. Now, is your father still alive?

A. No. My father died in 1971.

Q. Do you know the exact date of his death?

A. I believe it was April.

Q. And were there any distributions to your brother Joseph as a result of your father's death?

A. Yes. My father died and as a result of that my brother received in November of 1971, he received $1,528.68.

Q. I show you Government Exhibit Number 53 marked for identification. Do you recognize that?

A. Yes, I do.

Q. And what is that?

A. This is a bank draft payable to my brother Joseph Gay, dated November 1971 in the amount of one thousand five twenty-eight sixty-eight and I am the remitter.

Q. You are the remitter. That was on behalf of your father's estate, was it not?

A. That is true.

Q. Did you have a brother by the name of Florian?

A. Yes, I had a brother by the name of Florian.

Q. Is he deceased?

A. Yes. Florian died in September, 1971.

Q. And are you aware of any distribution made to your brother Joseph as a result of Florian's death?

A. Not to my knowledge.

Q. Did you have a brother by the name of Eugene?

A. Yes.

Q. Is he deceased?

A. Yes. He died in June of 1970.

Q. And are you aware of any distributions made to your brother Joseph as a result of his death?

A. Not to my knowledge.

MR. MELLENGER: I have no further questions.

CROSS EXAMINATION BY MR. MURPHY:

Q. Mr. Gaj, where are you employed, sir?

A. I am employed at the Buffalo Savings Bank.

Q. And in what capacity?

A. I am a life insurance accountant.

Q. All right, and have you always worked as a life insurance accountant for the bank?

A. No. I have worked for it in various capacities. When I started I worked as a teller and then I advanced myself whereby I had supervision over approximately twenty-five people and then after that I was promoted to manager of the life insurance accounting department.

Q. Mr. Gaj, you indicated that your father passed away in the year 1971?

A. Yes, sir.

Q. Now, were you familiar, sir, with any dealings that your father had with your brother Joseph?

A. Just after my mother died in 1960, I know that my father relied on my brother Joseph Gay for investment purposes.

Q And did he invest along with your brother in various investments?

A. Yes, he did.

Q All right. Now, are you, - is that all you do is work at the bank?

A. Yes. That is my prime position, working at the bank.

Q Now, did you, at any time, - were you at any time in business for yourself?

A. Yes, I was.

Q And when was that, sir?

A. I was in business in 1959, October, and I had a tavern at that time.

Q All right, and what is the name of that tavern?

A. The name of the tavern now is Park Lounge.

Q All right. Now, when did you get rid of that particular business?

A. Well, my wife took the tavern over in 1973, I believe.

Q All right, so that from '59 through '73 you were, - the license, as I understand it, was in your name, is that correct?

A. Yes, sir.

Q And then it was transferred to your wife's name?

A. Right.

Q. But it still remains in the family?

A. It does.

Q. You and your wife do reside and live together as husband and wife, is that true?

A. True.

Q. All right. Now, sir, did there come a time when your brother Joseph gave you a mortgage at any time?

A. In 1956. I wouldn't call it a mortgage. He gave me a loan. He gave me a loan of $15,000. I bought a home at 27 Borden Road in West Seneca.

Q. All right, and did there come a time, sir, when you disposed of that home?

A. Yes. I disposed of the home in 1960 and I paid back my brother thirteen thousand five hundred at that time.

Q. I see. You had in the meantime paid him back money previous to that?

A. Yes. Whenever I received a hundred dollars or $50 or whatever I could afford, I gave it to him. He never pressed me.

Q. All right. In any event, in 1956 how did he give you this money?

A. He gave it to me in cash.

Q. And where did he give it to you?

A. He gave it to me in his house.

Q. All right, and were you in a position, sir, to observe where he got the money from?

A. Yes. He got it from a box. He gave me three packs of $5,000 which indicated that there was hundreds and fifties, there was five thousand in each pack.

Q. All right, and were you able to see the contents of that box, sir?

A. Yes, I did.

Q. And tell us what you saw.

A. I was flabbergasted to see, I would estimate close to a hundred thousand dollars or more in that box.

Q. All right. Was it packaged in packages similar to the three packages of $5,000 each that you received?

A. Yes, it was.

Q. All right, and had you been in the banking business at that time?

A. Yes, I was.

Q. And used to handling currency?

A. Yes.

Q. All right. Now, would you say you estimate the contents of that box to be somewhere around a hundred thousand dollars or more?

A. I would swear to it because I have had occasion to go ahead and prove cash upwards of $650,000 which we kept in the vault in the Buffalo Savings Bank, so looking at a hundred thousand dollars just didn't phase me that much except that it kind of surprised me and flabbergasted me.

Q All right, and you say when you sold your home you repaid your brother, is that correct?

A That's true.

Q And how did you pay him back?

A I paid him back periodically in cash.

Q All right. Now, did there come times, sir, when there were contests at the Buffalo Savings Bank relative to opening new accounts?

A Yes, there was.

Q And have you ever been a member of those contests?

A I was.

Q Did you ever get your brother to open accounts as a part of these contests, sir?

A Yes, he did open accounts as part of these contests as a favor to me.

Q All right. Now, have you ever sold to your brother or purchased for your brother bank checks, Buffalo Savings Bank, bank checks?

A No.

Q All right. Do you know whether or not, - I am sorry. Do you know whether or not he ever deals in these types of checks?

A I don't know.

A. Now, is there such a thing as a checking account in the Buffalo Savings Bank?

A. No.

Q. Can you have a checking account?

A. No. By law we are not allowed to have a checking account.

Q. So that if someone were to be paid by a Buffalo Savings Bank check, can you tell me what kind of check that would be?

A. Yes. It would be similar to the bank draft that I have in my possession right here.

Q. All right, and that has to be purchased, is that right?

A. Right.

Q. Either by withdrawal from an account or by delivering cash to the individual teller who sells you the check, isn't that it?

A. That's right.

MR. MURPHY: All right. That is all. You may ask.

THE COURT: Mr. Mellenger.

BY MR. MURPHY:

Q. I am sorry, just a minute. One area I failed to cover. Mr. Gaj, you indicated, did you not, that you had a discussion yesterday with Mr. Mellenger, isn't that true?

A I did.

Q Was there anyone else present at that time?

A Mr. Quinn was present.

Q Now, Mr. Quinn you know to be an IRS Agent, sir?

A Yes.

Q And had you ever been in any conversations with him before?

A Yes, I was, when I was interrogated in his office.

Q All right. Well, interrogated, he asked you questions, is that right?

A Right.

Q He asked you to come down, did he not?

A Yes.

Q And you went there?

A True.

Q All right. Now, you were aware, were you not, that your brother was being investigated by the IRS?

A That's what they told me, yes.

Q All right. Now, did he inquire of you, with regard to inheritances, any possible distribution to your brother Joseph of portions of estates that would be due and owing to him?

A Yes, he did. I tried to tell him from the beginning what happened in 1961 and Mr. Quinn had indicated that he was not interested in anything that happened prior to 1969 so I just let it go at that. I just answered his questions.

Q And anything relative from '69 on?

A Right.

Q Was there a distribution made before '69?

A Yes, there was.

Q And when was that?

A In 1961.

Q All right. Now, did you yesterday tell Mr. Quinn or Mr. Mellenger about that?

A I told them about this and in fact Mr. Quinn had indicated that I was correct in my statement that he had said that he wasn't interested in anything prior to 1969. In fact, the prosector heard this.

Q All right. Now, do you ever know your brother to have been in a tavern business?

A Years back I believe he was but this was when I was very young and as to dates I couldn't really supply you with that.

Q All right, but you do know that he was in the tavern business some years back?

A Yes, he was.

Q Do you know whether he was in business in conjunction with his mother-in-law or whether or not his mother-in-law had in fact advanced him money for that business for him?

A. He had mentioned the fact to me that when he was in business in reference to a tavern that the mother-in-law did help him to some extent but as to what amount, I don't know.

MR. MURPHY: All right. That is all.

THE COURT: Mr. Mellenger.

REDIRECT EXAMINATION BY MR. MELLENGER.

Q. Yes, your Honor. You stated you received a mortgage loan from your brother when?

A. I received that in 1956.

Q. 1956, and at the time you took this loan out your brother paid you in these packs of $5,000 bills?

A. That is correct.

Q. And you made reference to a strong box which your brother pulled out?

A. That is true.

Q. And you estimated to be over $100,000 in that box, is that correct?

A. Yes.

Q. Where was the strong box pulled out from?

A. I don't know. He just brought it upstairs.

Q. It was just sitting on the table?

A. He brought it upstairs when I was sitting there.

Q. Did he have a printing business in his basement?

A. Yes, he did.

Q. Describe this strong box; how big was it?

A. I would say about 12 x 7.

Q. Feet or inches?

A. 12 inches by 7 inches and about 2 to 3 inches in depth.

Q. And what denominations were these bills?

A. All fifties and hundreds.

Q. And what was the color of the box?

A. The box was a greyish metalic box.

Q. And did it have a lock on it?

A. I didn't notice.

Q. Was it open or closed when you first saw it?

A. When he brought it up it was closed but then he opened it. Whether it was locked prior to that, I don't know.

Q. Did you ever see this box again after that date?

A. No, I did not.

Q. Now, these three packets of bills he gave you, the packets of $5,000 each, were those fifties or hundreds?

A. Fifties and hundreds mixed.

Q. Did you sign a mortgage instrument at that time?

A. What I did was, I signed a promisory note.

Q. You signed a promisory note?

A. Right.

Q. Regarding this conversation in my office yesterday where you again stated that as to Mr. Quinn not being interested in years prior to 1969, what was Mr. Quinn's reaction yesterday to that?

A. Well, Mr. Quinn had thought I had indicated 1970 at that time and that's what I thought too, referring back to when I was questioned by him but then he had said, "Well, no, this must have been prior to 1969", and you heard the same thing I did.

Q Isn't it a fact that Mr. Quinn said that he did not say that?

A. No.

Q You had mentioned that there was a distribution from your mother's estate in 1961, had you not?

A. Yes.

Q And what was the amount of that distribution?

A. I think it was $1,140.02.

Q $1,141.02?

A. Right.

MR. MELLENGER: I have no further questions of this witness, your Honor.

MR. MURPHY: I have nothing further.

THE COURT: Nothing further. Mr. Gaj, thank you, that is all.

MR. MELLENGER: The Government calls Ted Willis.

* * * * * * * * * *

TED WILLIS (1150 Broadway, Buffalo, New York), a witness called by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MELLENGER:

Q Mr. Willis, what is your occupation?

A I am a tax accountant.

Q What did you do before you became a tax accountant?

A I was with the Internal Revenue Service.

Q Were you a revenue agent or a special agent?

A I was both.

Q Both. Okay, since you have left the Internal Revenue Service, have you ever had occasion to do any work for Joseph J. Gay?

A I did.

Q Do you see him present in this courtroom?

A Yes, I do.

Q He is seated over at the table, is he not?

A Right over there, yes.

Q Did you ever prepare his tax returns?

A I did.

Q And when was the first year you prepared his tax return?

A I believe it was 1971 right through to the present.

Q Okay. I show you Government Exhibit Number 8 marked for identification and ask you to look at that.

A. Wait a minute until I put my - -

Q. Sure, take your time.

A. Yes. That is my name on it so therefore I prepared it April 10th.

Q. And how did you obtain Mr. Gay as a client?

A. I inherited him from Mr. Kuras. I bought out Mr. Kuras' accounting business and he was one of the clients that I got with the deal.

Q. Regarding the 1971 return which you prepared for Mr. Gay, who supplied you with the information to prepare it?

A. Well, Mr. Kuras got the information from Mr. Gay, the 1099's and slips of papers.

Q. You say you are still preparing returns for Mr. Gay, is that right?

A. I am.

Q. And who supplies you with that information?

A. Mr. Gaj and the 1099's and slips of paper.

Q. Does Mrs. Gaj ever supply you with any of this information?

A. She never supplied me with anything.

MR. MELLENGER: I have no further questions of this witness, your Honor.

THE COURT: Mr. Murphy.

CROSS EXAMINATION BY MR. MURPHY:

Q Have you had occasion to see Mr. Gay's records, sir?

A Oh, yes. I have seen his checks for, - what do you call it, his printing shop.

Q Checks for his printing shop?

A Yes.

Q How about income from his printing shop?

A Well, he gives it to me on slips of paper what he took in and so forth.

Q Yes, but did you ever see his actual book to add that up?

A I believe so, yes.

Q Is it a fact that there are items therein for $3, $2?

A I believe so.

Q All right, and private mortgages, sir?

A Yes. He reported private mortgages, give me a list of them and I reported the interest that he had on them. He had schedules made up of how much was the principal and how much was the interest.

Q All right. That would be his own records?

A His own records, that's correct. He kept a very good record of that.

Q All right. You indicated his 1099's. What did they reflect?

A They reflected dividend income and interest income from

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various corporations and various banks and the reason I recall them so distinctly is because Mr. Gay has Niagara Mohawk and Niagara Mohawk often is an exclusion from income tax and they also have distribution that is not taxable at all and you have to be careful with those 1099's because if he gets eight thousand dollars the whole thousand may be excludable from income.

Q All right. Now, did he also show you, sir, with regard to any stock transaction the sheets from his brokerage firm?

A. I believe so, yes.

Q All right. Now, these are the things that an ordinary taxpayer would have with regard to these if he is not familiar with the tax laws, is that correct?

A. That's correct, yes.

Q All right. Now, then you, as a trained accountant, who is familiar with the tax laws, if you have any questions of him from this material, you could develop sources of income, is that right?

A. That is correct.

Q And bank accounts, the bank sent out 1099's too, isn't that true?

A. That is correct.

Q So it is not necessary for you to see the bank book itself, is it?

A. No, it never was necessary.

Q. All right, as far as you were concerned, did Mr. Gay keep a complete set of records?

A. I would say he kept a good set of records and in other words, Mr. Kuras has a reputation of having good accounts and I was joyful again to get him because whenever he brought his information it was very complete and adequately expressed.

Q. And any inquiries you had, of course, he would fill you in?

A. Right. Once in awhile I had inquiries. At the beginning Niagara Mohawk, I always had inquiries about that because I wanted to make sure how much was excludable and so forth.

Q. All right. Now, did there come a time, sir, when you accompanied him to the Federal Revenue, or to the Intelligence Division pursuant to their investigation?

A. Yes, I did.

Q. All right, and did Mr. Gay, in fact, use you as an advisor there?

A. He did.

Q. All right. With respect to his cooperation, sir, did you advise him anything with regard to that?

A. I advised him to cooperate wholeheartedly which he wholeheartedly did. We even made out a spread for the

IRS because I was confident that whatever he had reported was correct.

Q All right, so what you took, everything that was available, Mr. Gay gave to the IRS?

A That is correct. We cooperated wholeheartedly.

Q All right. Now, you, sir, you were an Intelligence Agent, is that correct?

A That is correct. That is the reason I told him to do so because they have resources much better than I had.

Q All right.

A And I knew whatever we gave them they had already.

Q All right. In any event, you are familiar with criminal investigations, isn't that true?

A I am very familiar with them, yes.

Q All right, and Mr. Gay, did he object to giving them any of this material?

A No, he did not. He cooperated with them wholeheartedly.

MR. MURPHY: Thank you. That is all I have.

THE COURT: Mr. Mellenger, anything else?

MR. MELLENGER: Nothing further, your Honor.

THE COURT: Thank you. Mr. Mellenger, what's next?

MR. MELLENGER: That is the last witness that I have other than Mr. Russo.

THE COURT: I know that it will take some arrangement making to get that information together. Can you and Mr. Murphy step up here?

(Off the record sidebar conference held between Court and Counsel.)

THE COURT: Ladies and gentlemen, we will be in recess in this case until tomorrow morning. In tax cases there are a lot of sort of rushing that has to be done to get records together and there must be a period of preparation and study so that then the material may be gathered together and given to you in an understandable form and we are about at that stage in the case at this time so I think the best thing to do is to be in recess until tomorrow morning and we will say 9:30. You may go out with the Marshal.

(Jury escorted from the courtroom.)

THE COURT: We can take care of the stipulations in the morning, Mr. Mellenger.

MR. MELLENGER: Okay, fine. Thank you.

THE COURT: Mr. Mellenger and Mr. Murphy, when we were at the sidebar as I understand there was some problem that you could foresee about some possible testimony.

MR. MELLENGER: Yes, your Honor. The Government is anticipating offering as an alternative source of income or probable source of income the defendant was engaged in - -

THE COURT: Likely source.

MR. MELLENGER: Likely source. The defendant was engaged in bookmaking activities during the years in question and also subsequent to those years. The basic proof that the Government has is a precinct policeman who received information from an informant who is now dead that the defendant was engaged in bookmaking activities in 1968 and in fact had a warrant sworn out for the defendant at one point. The Government also has testimony of a Thomas Press who is a police officer.

THE COURT: Let me ask you this, do you have the complaint and the warrant, do you have a copy of those records?

MR. MELLENGER: I don't have those present here at this time.

THE COURT: I mean are they available?

MR. MELLENGER: Yes. I am trying to obtain those at this point.

THE COURT: City Court?

MR. MELLENGER: Yes. I do have a certified copy of the arrest record.

THE COURT: What is the complaint, what does the complaint say?

MR. MELLENGER: The complaint is based on gambling activities by the defendant.

THE COURT: Is that all it says?

MR. MELLENGER: Yes. I have not seen a copy of the complaint itself.

THE COURT: What else would you propose to do?

MR. MELLENGER: I propose to introduce the testimony of a Thomas Press who is a police officer who would testify that he has placed bets with the defendant as recently as 1972.

THE COURT: Did he make wagers with the defendant during this period of time?

MR. MELLENGER: Well, that is '72. I anticipated introducing a '66 arrest and the complaint and the '72 activity to show the possibility of continuous conduct in the years in question.

THE COURT: Does Mr. Press have any other information about the wagering activities? You say bookmaking?

MR. MELLENGER: Yes.

THE COURT: If a man is in the business of receiving bets and he spends some time at it then it is bookmaking. If he takes a bet, places a bet, then he is an occasional bettor. I suppose that if he made a pretty good sum of money at it it would make a difference, but if a man only made a bet every once in a while, it would not make any substantial difference at all one way or another.

MR. MELLENGER: That, plus the fact that in the precinct house there are a number of complaints filed against Joseph J. Gay and activities at the Park Lounge and there also have been a number of arrests prior to the indictment years.

THE COURT: What proof do you have of that?

MR. MELLENGER: That I would just bring in the business records or the arrest records, your Honor.

THE COURT: Do you have the officers that engaged in these investigations?

MR. MELLENGER: I have the officer who engaged in the '68 investigation based on an informant which he found to be reliable but who is no longer living and I have Thomas Press in '72 who did actually place the - -

THE COURT: You say there were a number of other arrest warrants and complaints in the precinct house?

MR. MELLENGER: Well, he had been arrested prior to this for bookmaking and there have been complaints against the defendant, although some of the admittedly are anonymous to the precinct.

THE COURT: Was there any investigation by the State Liquor Authority or the [illegible]

MR. MELLENGER: Mr. Leonard Gaj, but no [illegible] eph Gay.

THE COURT: Mr. Murphy.

MR. MURPHY: As I understand the '68 incident, your Honor, that was dismissed. It never came to trial. There was never any conviction.

THE COURT: That is not the point we are about here. It does not make any difference whether these charges are dismissed. I am concerned about the skimpiness of it. If he can show a likely source of income it is important in tax cases. It seems to me it is late in the game to be thinking about this kind of business. There are a lot of cases where this kind of testimony is admissible. Did you get any of those cases together, Mr. Mellenger?

MR. MELLENGER: I have done some brief research. I haven't got a memorandum on that.

THE COURT: Get somebody downstairs to give you an assist. There was one case that Judge Burke had in Rochester a few years ago in which this kind of evidence came in but as I recall, if I recall correctly, there was a good bit of it. You are trying to show, as I understand it, that a reason for income during the years in question, and substantial income during the years in question. To do that I think if you bring in, let us say, what you have told me thus far, it might indicate that Mr. Gay had placed an occasional bet or received an occasional wager but it would not really lead anyone to the conclusion that there was anything substantial to it. If you had a number of people or if you had a police officer that could tell us about a number of incidents, it might be something else again but you have to prove, - we are not concerned here with a proof of guilt of a wagering violation.

MR. MELLENGER: Yes, I know.

THE COURT: We are only concerned with whether or not a person was engaged in a business from which he perhaps got substantial income. Would not make any difference whether or not it was bookmaking or running a marina.

MR. MELLENGER: Yes.

THE COURT: If, for example, a taxpayer had a job at a particular place like Mr. Gay, the last witness, in a bank and you were looking at his tax returns and he said he ran a restaurant and that was on his returns but he also had, say in the summertime he spent four hours a day at the marina but nothing appeared on that then if you bring in somebody who would say "We saw him there and he seemed to be in a position to direct affairs and there were twenty-five boats in the harbor and people paid rental", then you would have something.

MR. MELLENGER: Yes, your Honor.

THE COURT: I mean this is so skimpy and the trouble here is that if you bring in a little bit then it becomes highly prejudicial to the defendant because then you do not know whether the jury is convicting because they are convinced beyond a reasonable doubt that he violated the income tax laws or perhaps because a juror does not like wagering, so if you are going to have this evidence, it seems to me that you have to have more of it then what you have talked to me about.

MR. MELLENGER: Yes, your Honor.

THE COURT: Do you have any suggestions now, Mr. Murphy?

MR. MURPHY: Well, the only thing, your Honor, I would hate to go through this trial at this point and if the evidence were heard by the jury and your Honor considered it so skimpy that it might be - -

THE COURT: I think what we are going to do first, Mr. Murphy, we have had the informal offer here and if Mr. Mellenger wants to bring in anything like this, we will take it out of the jury's presence.

MR. MURPHY: That is what I was going to suggest.

THE COURT: Or maybe he can come in and tell us in greater detail the first thing in the morning what he is going to do or what he hopes to do and then maybe we can make a ruling without having the hearing.

MR. MURPHY: All right.

THE COURT: But if he is going to go ahead with this kind of a business I think you should have those witnesses here first thing in the morning and in the meantime, as you say, this will have nothing to do with

Mr. Russo's computation.

MR. MELLENGER: All right.

THE COURT: So he can go ahead with is computation and preparation of a summaries that you intend to offer in evidence or give to the jury because in this cas again, it seems to me it is the kind of a case, if the jury is going to understan it, that you should have his final chart in a form so that it can be handed to the jury.

MR. MELLENGER: When would you anticipate Mr. Russo' testimony going to the jury?

THE COURT: If we can do it tomorrow, let us do it tomorrow. On the other hand, I am not going to be here Thursday and Friday. It might be better for the sake of accuracy to take care of these other problems tomorrow and then we can take Mr. Russo first thing on Tuesday next.

MR. MELLENGER: Okay, fine.

THE COURT: Mr. Murphy, just for my scheduling, do you have any idea yet, will your case be long, short?

MR. MURPHY: I would expect, your Honor, at the most, three days, at the most, but if we go through seven witnesses like we did this morning, it could come down to a day and a half.

THE COURT: You do think you will have some witnesses?

MR. MURPHY: I expect about seven; one long witness, your Honor, four medium and seven very short witnesses.

THE COURT: Fine, all right. Thank you. We will be in recess until tomorrow.

(Recess taken at 4:13 p.m.)

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

* *

THE UNITED STATES

-v-

JOSEPH V. GAY,

Defendant.

CRIMINAL DOCKET
NO. 1974-143

* *

Proceedings of trial held before the HON. JOHN T. CURTIN, and a Jury, in Part I, United States Court House, Buffalo, New York, resuming on March 31, 1976.

APPEARANCES:

RICHARD J. ARCARA, United States Attorney by RICHARD MELLENGER, Assistant United States Attorney.

ROBERT M. MURPHY, Esq., Attorney for the Defendant.

* * * * *

PROCEEDINGS: March 31, 1976, 9:45 a.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury not present.)

THE COURT: In the case of United States vs. Gay.

MR. MELLENGER: Your Honor, I have possibly four witnesses which I would like to call. The first is I would like to recall Kenneth Krysztof, Special Agent, to testify as to during one of the interviews he had with the defendant he specifically asked the defendant about bookmaking activities. At that time the defendant told him he used to be a bookmaker but is no longer in the business.

The second witness I have is a police officer, Al Rosenow who would testify he did some undercover work at Gay's Lounge in May or June of 1968. At that time he observed the defendant taking bets on numerous occasions, attempted to place a bet with the defendant at one time, had talked to him about the terms of the race and everything like that and was about to hand him the slip and the money and somebody called the defendant away at that point and the defendant came back and said, "Are you a police officer?" and walked away from him, but he can testify to observing the defendant receiving bets on numerous occasions in '68, and I also have a police officer by the name of Tom Press who can testify as to specifically placing bets with the defendant on August 3rd 1973 and also August 9, 1973, and finally there is a John Matteo of the Gambling Squad who would be called as to receiving numerous complaints about the defendant's gambling activities in the years in question and admittedly each one of these witnesses standing by himself would be inconsequential and would tend to be prejudicial but I believe that all four witnesses, their testimony taken in conjunction with one another would place the defendant in the bookmaking business.

THE COURT: Excuse me. I missed your explanation of the third witness.

MR. MELLENGER: The third witness placed two bets with the defendant in August of 1973 and had been paid off, although not by the defendant, but by somebody at Gay's Lounge for bets that he had placed with the defendant and this what we have is --

THE COURT: Did this person make any bets with him during the period, the tax period?

MR. MELLENGER: No, he didn't, your Honor, but what we have is an admission by the defendant that he was in the bookmaking business to Kenneth Krysztof prior to the tax years and we have him being observed taking bets in '68.

THE COURT: During his interview with Krysztof, what is it Krysztof will say that the defendant said?

MR. MELLENGER: Krysztof asked the defendant whether he was in the bookmaking business and the defendant said "No, I am not in the bookmaking business at this point, but I was ten years ago." or something to that effect, "I used to be a bookmaker, but I am not any longer".

THE COURT: Was there any indication whether or not he was during the tax years or that he was not?

MR. MELLENGER: There is an indication that he was during the tax years based on complaints received by --

THE COURT: No, no, excuse me. Let us take one thing at a time.

MR. MELLENGER: Okay.

THE COURT: From the testimony of Mr. Krysztof, is it clear whether or not he was in the bookmaking business during the tax years or is it clear that he was not, or isn't it clear one way or the other?

MR. MELLENGER: Well, he denies being in the bookmaking business during the tax years to Mr. Krysztof.

THE COURT: In other words, he said, "About ten years ago I was in the bookmaking business", which would take us back beyond the tax years?

MR. MELLENGER: Right.

THE COURT: "Then I got out of the business"?

MR. MELLENGER: Right.

THE COURT: Mr. Murphy, what do you say to this?

MR. MURPHY: As I understand, your Honor, and I don't have it specifically, the terms "bookmaking business" were not used specifically either by my client or from reading Krysztof's report, your Honor.

THE COURT: Maybe we should get to something else before we get to that. Do you have some cases, Mr. Mellenger, which support your theory that you can put this material in now?

MR. MELLENGER: Yes, your Honor, I have.

THE COURT: Will you call them to our attention?

MR. MELLENGER: Yes, I have three cases. One, U.S. vs. Williams, Court of Appeals in Maryland. It is 355 --

THE COURT: 355?

MR. MELLENGER: Yes, F.2 516.

THE COURT: All right.

MR. MELLENGER: Miller vs. U. S., which is 354 F.2 801, and U. S. vs. Skidmor, 123 F.2 604, cert denied 315 U.S. 800.

THE COURT: Are you sure that is 123?

MR. MELLENGER: Yes, your Honor.

THE COURT: And then the U.S. cite is 304?

MR. MELLENGER: 315 U.S. 800.

THE COURT: That does not seem to make sense, Mr. Mellenger, because we are now in the 300 series of the Supreme Court now and 123 would indicate it was a long time ago.

MR. MELLENGER: I am reading this cite out of the annotations for Section 7201. It might possibly be a misprint.

THE COURT: We will look at it.

MR. MELLENGER: These cases stand for the admissibility of evidence other than convictions to place a defendant in another business and there are two other cases, U.S. vs. Guidarelli --

THE COURT: G-u-i --

MR. MELLENGER: d-a-r-e-l-l-i, which is 318 F.2 523, which is a Second Circuit case in 1963 and this case allowed --.

THE COURT: I can read the case. You just give me the case.

MR. MELLENGER: Okay. Well, I am citing this for a specific proposition in that in this case criminal activities other than in the indictment years was allowed to show another activity, another likely source of income.

THE COURT: I do not quarrel with that at all. What I want to do is find out the quality of the evidence. I do not fight with the idea. Certainly if a man was in the business of robbing banks, we could put in evidence here evidence of bank robberies to show that he had income of $200,000 from four bank robberies that netted him $50,000 each. I do not quarrel with that. What I want to determine is whether or not your proposed evidence comes up to the standard of quality necessary to be admitted. What is the other case?

MR. MELLENGER: That is it.

THE COURT: I thought you said you had Guidarelli and then another one.

MR. MELLENGER: Well, the other case I have I have previously cited, U.S. vs. Williams. I was going to cite that for another proposition.

THE COURT: Let us go back to the drawing board. You have Krysztof.

MR. MELLENGER: Right.

THE COURT: So that sums up to say that Mr. Gay admitted to him that he was a bookmaker before the indictment years but quit.

MR. MELLENGER: Yes.

THE COURT: Two, you have a police officer.

MR. MELLENGER: Yes. I have a police officer who did some undercover work at Gay's Lounge in 1968, May or June of 1968.

THE COURT: All right, clearly in the indictment years, 1968. What did he do?

MR. MELLENGER: At that time he observed the defendant receiving bets at Gay's Lounge on numerous occasions.

THE COURT: When he says "On numerous occasions" that would mean on different days.

MR. MELLENGER: Different days.

THE COURT: And from different people.

MR. MELLENGER: Yes.

THE COURT: And that he attempted to bet which was aborted after Gay learned he was a police officer.

MR. MELLENGER: Right.

THE COURT: Sound judgment.

MR. MELLENGER: Evidently I agree with that. Next we have an officer by the name of Thomas Press who will testify as to two separate occasions in 1973 placing bets with Joseph Gay and as to winning one of these bets and being paid off, but being paid off by somebody other than the defendant.

THE COURT: All right, and the fourth is --

MR. MELLENGER: Is a John Matteo of the Gambling Squad and he will testify as to receiving numerous complaints, although anonymous.

THE COURT: Irate wives and mothers, right?

MR. MELLENGER: Yes.

THE COURT: And the callers would identify Mr. Gay?

MR. MELLENGER: Yes.

THE COURT: Not his brother but --

MR. MELLENGER: Mr. Gay, Joseph Gay.

THE COURT: Do you have any cases, Mr. Murphy?

MR. MURPHY: No, your Honor.

THE COURT: Let me look at the cases and then

I will return. Why don't you let Mr. Murphy read those. Let him use the books in your library so he can look at them and comment on them with some knowledge when we return. I will let you know when we will be coming back.

(Recess taken at 9:56 a.m.)

* * * * * * * *

PROCEEDINGS: After recess, 10:40 a.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury not present.)

THE COURT: After I talked to counsel, I had an opportunity to look at several cases, several of those which you called to my attention, Mr. Mellenger, and several others that came up right away and it seemed to me the highlight of this problem immediately and the difficulties surrounding it before I get to discuss those, are there any others that you want to talk about?

MR. MELLENGER: No, your Honor.

THE COURT: Mr. Murphy?

MR. MURPHY: No. I just read the cases that were cited, your Honor.

THE COURT: I think there are several other cases and, Mr. Mellenger, for your future guidance it seems to me that this should have been well researched before we started this case and the facts, of course, you are stuck with facts. You can only develop facts as far as the evidence of witnesses will go and then you are stuck with it, but if you wanted to press this issue, it seems to me you would have been well advised to have this well briefed beforehand. This morning, fo example, when I asked you about whether or not, - it did turn out that the Skidmor case was at 123, but when I asked you I wondered about the citation by the Supreme Court and you said it was a headnote. That is not the way to research cases and it is certainly not the way to argue a matter when you come into court.

There are several cases here which seem to me that highlight, and there probably are others that maybe do it better, but one case for example which you cited to me was the Guidarelli case, 318 F.2 523. In this situation the part that seems to me to be important is that in that case indeed the evidence of bookmaking activity was permitted. The Court talks about it in this way, defendant complains of the use in evidence of his arrest for bookmaking in 1955 and 1958, his conviction for those offenses and the payment by him in 1955 of a $1,000 fine. The Government may have made generous use of defendant's vulnerability from his gambling activities, but this was part of the story in the case, but it is important to note that in that instance that the evidence was a conviction and the payment of a fine but then it is well to note what the court said. The court said that the Government made generous use of his gambling activities. The danger, it is obvious, is that when you are going to have proof such as this, that you have to perhaps have more than --

MR. MELLENGER: Your Honor.--

THE COURT: Excuse me, Mr. Mellenger.

MR. MELLENGER: I am sorry.

THE COURT: I am going to give you an opportunity to say something, but I want you to listen to me first.

MR. MELLENGER: Yes, your Honor.

THE COURT: Listen and make notes.

MR. MELLENGER: Yes, your Honor.

THE COURT: In the case of Williams, United States against Pearl Williams, 355 F.2 516, in that case Judge Northrup in the Maryland District Court permitted in evidence the fact that the lady involved ran a house of prostitution and it was permitted. However, the evidence offered was through an undercover agent that he was instructed by the defendant to pay a girl who, by defendant's prearrangement, was about to become his temporary partner. It may be inferred, however, that financial gain did attend the performance of the role of running the house. The other thing in that case that there was evidently other testimony about her activities and this was in the court's view sufficient. This case it seems to me is the best one for you that I have been able to find because there the direct proof was of one incident and the other evidence in the case seemed to me to be more general in nature. We have the Ford case. There are two Ford cases, both of which are important. One Ford case which you certainly should be familiar with because it was tried in this district by Judge Burke and it is reported at 237 F.2 57. In this case Mr. Ford was a Rochester police officer and during the course of the trial the court permitted in evidence the evidence of illegal payments made to Mr. Ford. This case is again one which is helpful to your argument.

The court there observed at Page 65, "The defendant urges that the evidence related to graft opportunity should have been excluded as prejudicial to the defendant since the Government failed to link him directly with graft. We do not agree. The evidence showed a possibility of graft although not sufficient in itself to prove unreported current receipts was relevant and material for its tendency to show that the unreported receipts independently established derived from a taxable source. The evidence, therefore, was properly received as corroborative. It added strength to the inference that the unreported receipts were taxable."

In that case the court explained at length the detail in which the Government had shown the underlying, as in this case, I would suppose, as far as the figures are concerned. The difficulty here is that they do not discuss in detail what the testimony was. They talk about there generally about graft opportunities and at least it seemed to me that that had to do with evidence which occurred during the course of the years in question.

There is another Ford case cited at 210 F.2 313 and at Page 317 the Fifth Circuit discusses the problem of testimony about illegal payments. Again in this case Mr. Ford was another policeman. He, however, was a policeman in Texas. At 317 the court in discussing this problem said, "The appelant next insists that the court erred in admitting the testimony of Margaret Lara who had operated a house of prostitution in Galveston since 1941. Over defendant's objection, she testified in 1943 she left $100 in cash in the defendant's office. Starting the latter part of 1945 and continuing through May 1947 she made regular payoffs to the police department of $100 per month. The nearest she came to connecting defendant with the payoff was by a conversation in 1949 when she testified the defendant requested her aid in a political campaign on the ground as stated by him that 'He had been good to me through the years'". The court continued, "There was no sufficient proof the defendant received the payoffs or any part of them", and then they talk about other cases.

I wonder, Mr. Fitzgerald, will you see if you can find the Sullivan case, Second Circuit, 98 F.2 79.

In discussing this problem the court continued, "The evidence sufficiently disclosed that in the defendant's office as chief of police he had opportunities of receiving income from graft, payoffs or other illegal sources. There can be no presumption that the defendant was guilty of such gross misconduct as to be the recipient of such ill-gotten gains. The presumption is to the contrary." Then they talk about what the jury's function is and then they go on to say, "But to undertake to aid the jury in its function, the admission of testimony of a woman as to payoffs of which the defendant was not shown to be connected is both erroneous and highly prejudicial".

In this case that seems to me, for example, the evidence you have about phone calls I can see where if you have this situation where there was a direct contact with the defendant, that is one thing, but phone calls are something else.

MR. MELLENGER: Your Honor, I would be willing to concede that the phone calls would be a bit too prejudicial.

THE COURT: Finally, the Skidmor case which indeed is reported at 123 F.2 604, and at Page 608 the court, the Seventh Circuit discusses this problem. During the years in question in the Skidmor case the evidence had disclosed that defendant had purchased large amounts of real estate during the period. Then the court went on to say "The evidence further discloses that during these times he sold protection to those who desired to engage in the handbook business. Many witnesses testified that they went to a junkyard and personally handed him sums ranging from fifty to two hundred dollars in currency and received permission from him to open handbook establishments. They paid him a sum fixed by him each month so long as they operated a handbook business. In calling on his office for that purpose, they found many men in line waiting to be admitted to his office but admitted each remained a very brief time and retired. When the witnesses were admitted, they handed money to appelant. He noted it on a paper and they retired."

That is certainly a far cry from the proposed testimony we have here. You do have this in the case, you have the testimony yesterday of Mr. Gaj who told us about this, - the box. You have the testimony, proposed testimony of the agent who says, "I used to be, Mr. Agent, I was in the business, the bookmaking business about two years and then I out". Now we have the testimony of a police officer who testified he made bets in '73 which is after the time and I suppose it may indicate to a person that he had continued through this period and we have the testimony of the officer who, during the period, observed wagering activities on a number of occasions and was about to make a bet when it was aborted. I think that we ought to hear the testimony out of the jury's presence first and then determine what to do after we have heard that, and I do not think we should hear any testimony about the rumors.

MR. MELLENGER: I would agree with that, your Honor. I think it would be highly prejudicial. Should I call the witness?

THE COURT: Mr. Murphy, any suggestions?

MR. MURPHY: No. I would propose that the hearing be conducted so that your Honor sees the value of the testimony and then determine whether or not it is admissible under the cases.

THE COURT: Mr. White, would you tell the jury we can let them go out in the rain until noon. I would think we would not be able to start before then.

MR. MELLENGER: Your Honor, we should be aware that if these witnesses' testimony is not admitted, the only other thing I have for the jury would be the reading of the affidavits.

THE COURT: The reading of the stipulations?

MR. MELLENGER: The reading of the stipulations, and there are three or four of those.

THE COURT: We have Mr. Russo?

MR. MELLENGER: I don't think Mr. Russo will be prepared today.

THE COURT: That is all right. All right. Let us have the witness.

* * * * * * * * *

KENNETH M. KRYSZTOF, a witness called by and in behalf of the Government, having been previously duly sworn, resumed the witness stand and testified further as follows:

REDIRECT EXAMINATION BY MR. MELLENGER:

THE COURT: Mr. Krysztof has been previously sworn.

BY MR. MELLENGER:

Q. Mr. Krysztof, you have previously testified in this court that you had conducted an interview with the defendant Joseph Gay on December 28, 1971, is that correct?

A. Yes.

Q. And during the course of that interview, did you have occasion to ask him about gambling income?

A. Yes, I did.

Q. And what, if anything, did you ask him about gambling income and what did he say to you?

A. I asked Mr. Gay if he was involved in gambling and he says no, that he was not. I asked him if he was, - if he ever printed any football cards or took any bets on horses or individual sporting events such as football games and he replied that he does not. He then stated that approximately ten years ago he did take some bets but has not taken any bets since then.

Q. And this was December 28, 1971?

A. Yes.

MR. MELLENGER: No further questions, your Honor.

THE COURT: Mr. Murphy.

RECROSS EXAMINATION BY MR. MURPHY:

Q. Now, that would be the entire conversation as you recall it, is that right?

A. Yes, sir.

THE COURT: Excuse me. Is this part of another interview, Mr. Krysztof?

THE WITNESS: No, your Honor, this is part of the interview on December 28, 1971.

THE COURT: Right, and you testified to that before?

THE WITNESS: I testified about that interview but not regarding this area.

THE COURT: But this point did come up during that conversation?

THE WITNESS: Yes, it did.

THE COURT: Which you had with us before?

THE WITNESS: Yes.

THE COURT: Or you told us about before?

THE WITNESS: Right.

THE COURT: All right.

BY MR. MURPHY:

Q. Now, he did take some bets. Is that betting with individuals on specific football games, basketball games, elections?

A. I don't know, sir.

Q. You don't know. All he said to you was he took some bets?

A. That's correct.

Q. But he doesn't anymore?

A. That's what he said.

MR. MURPHY: That's all.

MR. MELLENGER: Nothing further of this witness.

THE COURT: Nothing else. All right, Mr. Krysztof, thank you.

MR. MELLENGER: Al. Rosenow.

* * * * * * *

ALFRED W. ROSENOW (Precinct Number 7, 300 Louisiana Street, Buffalo, New York), a witness called by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MELLENGER:

Q. Mr. Rosenow, you are employed by the Buffalo Police Department as a police officer, are you not?

A. Yes, sir.

Q. And you were so employed in '68?

A. Yes, sir.

Q. Calling your attention to May and June of 1968, did you ever have occasion to do undercover work at Gay's Lounge at Clinton Street in Buffalo?

A. Yes, sir, I had.

Q. Okay, and how many occasions were you there, approximately

A. Approximately over a two-month period. Ten to fifteen times.

Q. Did you ever have occasion to meet an individual by the name of Joseph Gay?

A. Yes, sir.

Q. Do you see him present in this courtroom?

A. Yes, I do. He is seated at the counselor's table with Mr. Murphy.

Q. Did you ever have occasion to observe Mr. Gay doing anything at that time?

A. Yes, I did.

Q. What did you observe him do?

A. There were occasions where he would be serving drinks and general bartending work and at the same time he was taking bets.

Q. He was taking bets; taking bets on what?

A. Horses.

Q. And on how many occasions had you seen him taking bets?

A. I can't remember the exact amount, sir, due to the time element, but more than ten times.

Q. And when you had observed him taking bets, were these all from the same person or from different people?

A. Different people.

Q. Okay. When you say you saw him taking bets, what actually did you see him do?

A. All I would see him do was talk over, perhaps, some sort of betting activity with the gentlemen and then take money and papers from them.

Q. Okay. Do you know what was on the papers?

A. Not on every occasion, but what would happen is that the gentleman that was going to place the bet would go in the back room with a scratch sheet or the form for the racetrack and would sit at the table and write, you know, I could see him with his finger on the paper, et cetera, and then write something on the paper, take some money out of his pocket and then rip the paper off the pad, and walk to Mr. Gay and give him the money and the paper.

Q. On how many occasions did you observe activity such as this?

A. More than ten times, sir.

Q. Did you ever attempt to place any bets with Mr. Gay?

A. Yes, I did.

Q. Do you recall on how many occasions?

A. The only time I remember specifically was, as I recall, it was a Saturday.

Q. And approximately when was this; was this in May or June?

A. In June.

Q. Okay. Do you know the date?

A. The exact date I don't recall, but I think it was one week before the date of the issuance of the search warrant.

Q. Okay. We don't want to get into anything about a search warrant. To the best of your recollection, what did you say to Mr. Gay at this time and what did he say to you?

A. At this time, - this was after the Kentucky Derby and there is a time difference between the Kentucky Derby and the Preakness and there was something unusual that happened that particular Kentucky Derby week, whether it was the favorite horse didn't come in or he was scratched because of some illegal doings, but there was something about that particular race and we were discussing about that and the next week I came in. We were discussing it further and this was the week that the Preakness was going to be run and I was seated at the bar drinking at the time and as I recall, it was somewheres in the noon hour, maybe between, say, 11:00, 11:30 to 12:00 o'clock, 1:00 o'clock, and he had, - I had told him I would like to, - if I had the chance I would bet $5 on this specific horse. I don't recall what it was right now and he told me, "Well, go in the back and make it out", so I took my own scratch sheet that I had with me. I took it to the back room. They had these little papers such as this, the same type, just a little white pad, and I put down the name of the horse, what race he was running in and what place, you know, what the location was of the track.

Q. Okay, and what did you do then?

A. I took $5 from my wallet and I took the piece of paper that I had in my hand. I had them together and I was walking toward Mr. Gay and Mr. Gay was in the doorway. Now, there was, - the door which you came in the tavern and then the tavern room and then the back room and he was standing in the doorway of the tavern, between the tavern and the back room and I was walking to him to give him the bet and some old gentleman walked into the tavern and he yelled out, "Hey, Joe, come here", so Joe says, "I will be right with you", and Joe turned around and talked to this man and I could hear him say, "He is a policeman".

Q. Not what this man said, just that they had conversation.

A. Yes. He had a conversation with the gentleman.

Q. And then what happened?

A. Mr. Gay walked up to me and said, "Are you a policeman?" and I denied being a policeman and I finished my drink and I says, "Do you want this bet?" and he said "No", and then I walked out.

MR. MELLENGER: No other questions.

CROSS EXAMINATION BY MR. MURPHY:

Q. Subsequently there was a search of the premises, is that true?

A. Yes.

Q. In which nothing was found, isn't that right?

A. I don't recall.

THE COURT: If you did find something you would have remembered, I suppose, or there would have been some kind of a charge placed.

THE WITNESS: We did arrest him so we must have found something.

BY MR. MURPHY:

Q. Let's say if you found something you then went into court, did you not?

A. Yes.

Q. And the case was dismissed without prejudice with leave to you to get more material to substantiate a case in an information and come back, isn't that right?

A. If you say so. I don't remember that.

Q. You don't know that?

A. No.

Q. Well, you never did go back after the case was dismissed without prejudice, isn't that true?

A. It would be fruitless.

Q. Well, you never went back, did you?

A. I couldn't go back.

Q. A dismissal without prejudice is a dismissal not on the merits, you know that, Officer?

A. Yes, sir.

Q. You have been in court a number of times?

A. Yes, sir.

Q. And if you did get something more, you were entitled to come back and file a new information?

A. That would be right, yes.

Q. This information was dismissed right on its face, wasn't it?

A. If you say so.

Q. Well, don't you know?

MR. MELLENGER: Your Honor, this witness wouldn't know

THE COURT: Mr. Mellenger, for heaven's sakes, get back to the point again that if there is anyone should know about this matter, and I know it is some eight years ago, but you could check on these things beforehand so the witness can be accurate.

THE WITNESS: We just got this information this morning, your Honor.

THE COURT: I know you don't remember, Mr. Rosenow, because it has been so long.

THE WITNESS: What I am getting at, we just were notified this morning and how could we find anything out?

THE COURT: I sympathize with you 1,000 per cent. I am not criticizing you at all. This is eight years ago and for you to try to remember all of this business is very difficult and I think under the circumstances it is certainly remarkable that you can recall as much as you did. I am not criticizing you.

THE WITNESS: May I refer to my notes, sir?

THE COURT: Certainly. These were made at the time?

THE WITNESS: These are notes and forms. I just want to check to see if I can update my memory.

MR. MURPHY: May I see that, please?

THE COURT: Mr. Rosenow, you know if you did go into court and there was a trial, the Government would have information about it, so I do not think it is necessary.

MR. MURPHY: All right.

THE COURT: If you could wait just for a few minutes, please, because we are making up our mind whether this information should go to the jury, so if you could just be with us just a few minutes more.

THE WITNESS: Sure.

THE COURT: Thank you. All right. Next witness, please.

MR. MELLENGER: Thomas Press.

* * * * * *

THOMAS PRESS (2022 South Park Ave[illegible] Buffalo, New York), a witness called by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MELLENGER:

Q. Mr. Press, you are a Buffalo Police officer, are you not?

A. Yes, sir.

Q. You were so employed in 1973?

A. Yes, I was.

Q. Calling your attention to August of 1973, did you have occasion to have any dealings with Mr. Joseph J. Gay?

A. Yes, I did.

Q. Do you see him present in this courtroom?

A. Yes, I do.

Q. Would you point him out and describe him, please?

A. Right here.

THE COURT: There is no jury here. The man with the gray hair?

THE WITNESS: Yes, sir.

THE COURT: All right.

BY MR. MELLENGER:

Q. And when was the first time you had contact with Mr. Gay?

A. August 3rd at approximately 1:50 p.m.

Q. Did you ever see him prior to August 3rd?

A. No, I didn't.

Q. Never met the man?

A. No, I didn't.

Q. Okay. What happened on August 3rd?

A. I see him take a bet from a gentleman and I placed a bet with him.

Q. What was said at the time you placed this bet with him?

A. Can I refer to my notes?

Q. Yes.

A. Shall I read them off?

THE COURT: Go right ahead.

THE WITNESS: On August 3, 1973 I entered the Park Lounge at approximately 1:50 p.m., located at 1761 Clinton Street and noticed Joe Gay, a man who was known to me as a bookmaker, at the Park Lounge, is known to me by mug shots I have seen in the past.

BY MR. MELLENGER:

Q. Other than mug shots, what was said?

A. Okay. An unidentified male hollered, "Hey, Sam". Joe

Gay answered "What you got?" The man replied, "I got a parlay on the 8th and 9th race at Fort Erie, Old Vintage and Call Him Stanley". Joe Gay also known as Sam then accepted the slip of paper.

THE COURT: Known as who, Sam?

THE WITNESS: Sam. The gentleman referred toward Joe Gay as the name Sam.

THE COURT: Did you say Sam Benek?

THE WITNESS: No, just Sam.

BY MR. MELLENGER:

Q. Okay. Did you say anything to him at this time?

A. I handed him a slip of paper with a $5 bill rolled up in it and on the slip of paper was a bet on Old Vintage in the 8th race at Fort Erie, three to win, two to place.

Q. Before you handed this to him, did you say anything to him?

A. Well, I was introduced to him by this man.

Q. Okay, and what did you say to him at that time?

A. I just handed him the bet, that's all, and he read the bet back to me.

Q. He read the bet back to you?

A. Yes.

Q. Anything else said at that time?

A. He put the bet in his pocket and left, no.

Q. Calling your attention to August 9, 1973, did you have occasion to see Mr. Gay on that day also?

A. Yes, I did.

Q. And what happened at that time?

A. At that time at approximately 1:00 p.m. I entered the Park Lounge, took a seat in front of the bar. I noticed Mr. Gay sitting at the bar. I nodded to Mr. Gay. He got up. He went into the men's room. I followed him into the men's room and handed him a white sheet of paper with a $5 bill and two bets. One bet was for a daily double, Numbers 11 and 3 at Fort Erie. One bet was for a $3 bet on True Pretense. He examined the bet, read it over, put it in his pocket and I left the men's room.

Q. Okay. Did you ever receive information that that daily double had come in?

A. Yes, I did.

Q. When did you receive that information?

A. The next morning I read in the Courier Express that the daily double won.

Q. Okay, and did you return to Gay's Lounge at that time?

A. Yes, I did.

Q. What happened when you returned there?

A. The next day I returned to the lounge and as I did

Mr. Socha was standing in the back of the lounge and called me back. I came back and he pulled out a sheet of paper with a bunch of names on it. He checked off my name and handed me $27.

Q. And what did you understand this payment of $27 to be for?

A. For winning the daily double from the 11 and 3 at Fort Erie.

MR. MELLENGER: No further questions, your Honor.

CROSS EXAMINATION BY MR. MURPHY:

Q. Now, Officer, isn't it right that every bet you made was at Fort Erie track?

A. I believe it was, sir. Yes, sir.

Q. Fort Erie was, - there was a meet going on at Fort Erie at the time, was there not?

A. There was a race running at that time, yes, sir.

Q. All right. Now, you took this case to court, did you not?

A. Yes, sir.

Q. And on the first bet, the third, - let's talk about that, isn't it a fact that at the day in court that you could find no such horse running at any track anywhere, the first bet?

A. I don't recall this, sir.

Q. Well, wasn't, - didn't Mr. Rodenburg defend Mr. Gay in this case, Salten Rodenburg?

A. I don't recall who defended him.

Q. Do you recall going to court, though?

A. Yes, I do.

Q. You recall the verdict, don't you?

A. Yes, I do.

Q. What?

A. Not guilty.

Q. On all charges?

A. On those charges, sir.

Q. All right. Now, there is nothing illegal, Officer, and you know this to be a fact, about taking bets to Fort Erie from Buffalo, is there?

A. I don't know this for a fact, no, sir.

Q. You don't? Well, it is legal to bet at Fort Erie, isn't it?

A. It is legal to bet at Fort Erie, yes.

Q. Whether these bets were taken to Fort Erie and actually placed at the legalized windows at Fort Erie you don't know, do you?

A. To my knowledge a $3 bet cannot be placed at the racetrack.

Q. I understand it can't be placed at the racetrack but if there are a number of $3 bets, they then become even number bets, isn't that right?

A. This is possible.

Q. All right. Don't you recall testifying in the courtroom before Judge Johnson?

A. Yes, I do, sir.

Q. All right, and on the first bet that you claim to have made on a horse, - what was the horse's name?

A. Old Vintage, 8th race at Fort Erie.

Q. Old Vintage?

A. Yes, sir.

Q. Don't you recall that when you testified in court that you made the bet for that day that the scratch sheet was produced and Old Vintage wasn't running anyplace near Fort Erie on that day?

A. I don't recall this.

THE COURT: At any rate, the verdict was not guilty.

MR. MURPHY: Yes, your Honor.

THE COURT: So the judge must have found some defect. Mr. Press, the second time around you did win the daily double bet and how much did you say, $27?

THE WITNESS: Yes, sir.

THE COURT: What was the payoff at the track, do you know?

THE WITNESS: No, I don't, sir.

THE COURT: Was it the same, was it $27?

THE WITNESS: It was close to twenty-seven. It might have been twenty-seven fifty.

THE COURT: Very well. Anything further?

BY MR. MURPHY:

Q. Just one. Officer, aren't you familiar with people who have taken bets to the track?

THE COURT: I am, Mr. Murphy, and I find that it is a common practice in the Buffalo area for many individuals as a matter of convenience for friends, - as a matter of fact, there are many people, I suppose, who operate taverns. They are, I imagine, putting themselves in jeopardy of investigation, but it certainly is no criminal conduct if a tavern owner in his day off is going over to Fort Erie if he has friends, relatives, associates who want him to make wagers for them, he makes wagers over there and he remits to them whatever their winnings are. That is a matter of convenience. That is not being a professional bookmaker.

MR. MURPHY: I have nothing further, your Honor.

THE COURT: You don't dispute that, do you, Mr. Murphy?

MR. MURPHY: No, your Honor.

THE COURT: Mr. Mellenger, anything further?

MR. MELLENGER: Nothing further, your Honor.

THE COURT: Thank you, Mr. Press. I believe that rather than carry on with this further, it seems to me, Mr. Mellenger, that it is a matter of too little and too late. It is too little because this evidence that we have in the context of the whole case would be highly prejudicial but really wouldn't be informative as to whether or not Mr. Gay during the years in question had a likely source of additional income. As far as the time, the prior witness, he was there on, and this is the most telling evidence because it happened during the indictment years and he was there ten

Discussion.

to fifteen times. It comes close, I think, but on the other hand, when you look at the cases and the cases that discuss in detail what is required, it seems to me that you have to have more than one instance. It is true that he said he was there ten to fifteen times and he saw bets being placed from time to time. It seems to me obvious from Mr. Rosenow's testimony here that he wasn't a horse player. He could not recall what happened at the Kentucky Derby in that year, something unusual, so whether or not, whether these other bets were similar to those made by Mr. Press or were not, I do not know.

There are many taverns where, and of course, as he said, there was a bet. It was not one of those kind of things where some kind of a cooperative lottery was run which there is nothing against the law in doing that. If a group of patrons want to see who is going to come in in the Kentucky Derby and they do it as a matter of fun and perhaps the tavern owner as a matter of convenience holds the stakes. The evidence of Mr. Krysztof is that this was ten years before. I believe that, and it seems to me this, of course, this type of evidence is most important and most telling, but if the Government was going to develop it, they should have developed it long before the last day of trial. They should have developed it in fairness to themselves because no doubt there is other information out there. They could have had the people, Mr. Rosenow, Mr. Press evidently are familiar with a number of other bettors and it is hard going, I know, to get people to testify, but under the immunity statutes now, you could have had all these people testify as to what the pattern of betting was with Mr. Gay during these years and you had plenty of opportunity to do it and it was not done and I do not think it is fair to the defendant and fair to the Court to come in here at the last minute with this kind of evidence.

We had the same situation develop in the Cipolla case where, at the last minute, the Government wants to come in with an additional theory and these cases, if they are important enough to indict, they are important enough to investigate, they are important enough to get all the facts which may be developed. In this case obviously there were many facts which the Government could have developed which would have led to admissible evidence if your theory is right and I just think that it is not going to be and I am not going to permit it.

MR. MELLENGER: Could I be heard on that for a minute, your Honor?

THE COURT: Certainly.

MR. MELLENGER: I think that under the Williams case where you have a situation where an undercover agent has made arrangements for a temporary partner, as the Williams case put it, which indicates prostitution activity, you had a situation where the defendant stated "Pay the girl when you are done", and here we don't have any money being given to the defendant whatsoever in the Williams case.

THE COURT: Reading between the lines, the decision in the Williams case is very short, but reading between the lines, in the Williams case it seems to me in addition to that, they had other evidence of something going on for some period of time, there were other statements made, but when you compare this case with the Ford case, for example, in Texas, I just think it is too prejudicial to bring in one instance and that is Mr. Rosenow to show that he made, he tried to, - he saw these two, three and five dollar bets being made on ten occasions. To jump from that to the particular argument that out of these wagers where at the best Mr. Gay would make a dollar or two on each one of these wagers, or even if he made $5 on each one, to jump to that, to the conclusion that there is substantial income here, it does not seem to be enough and again I am telling you that if you had perhaps got this prepared ahead of time and had it briefed and had it laid out, but here in the case where you could have had substantial number of other witnesses in here to testify about the pattern through the years, I think it is outrageous for the Government to argue now that we should have some police officer who was called the last day of the trial and wasn't even given an opportunity to adequately check out his notes of what happened. I think it is unfair to him and it is unfair to the Court, unfair to the jury and not fair to the defendant. I am not going to permit it. We will come back at noon and we will then have the reading of the stipulations.

MR. MELLENGER: Your Honor, I do have a number of exhibits which have not been moved into evidence which I would like to.

THE COURT: All right. Mr. Murphy, you have seen most of these?

MR. MURPHY: Yes, your Honor. I thought we had agreed on all of these.

THE COURT: All right. Why don't you make a record now of all of those. I will step off the bench but if there is any argument about any of them, let me know and we can have a discussion. You can make the record with Mr. Knisley and Mr. White.

(Government's Exhibits Numbered 58, 59, 60, 61, 73, 74, 75, 76, 77, 78, 80, 81, 82, 83, 83-1, 84, 85, 86, 87, 89, 91, 91-1, 91-2, 91-3, 91-4, 91-5, 91-6, 93, 94, 96, 96-1, 96-2, 96-3, 96-4, 96-5, 96-6, 96-7, 96-8, 96-9, 96-10, 96-11, 96-12, 96-13, 96-14, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 150, 151, 152, 153, 154 received in evidence.)

(Recess taken at 11:28 a.m.)

* * * * * *

PROCEEDINGS: After recess, 12:02 p.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury not present.)

THE COURT: Did you make the record on those?

MR. MURPHY: Yes. We had some to discuss with your Honor and now we have worked that out.

THE COURT: All right. Put those in.

MR. MELLENGER: Government Exhibits 12, - or excuse me, 11 through 16 are moved into evidence.

THE COURT: You do not object?

MR. MURPHY: No.

THE COURT: All right. Mark those exhibits in evidence.

(Government Exhibits Numbered 11, 12, 13, 14, 15, 16 received in evidence.)

MR. MELLENGER: Your Honor --

THE COURT: Yes.

MR. MELLENGER: We have moved into evidence certified copies of mortgages and I would just like to tell the jury where these came from because there has been no mention of them.

THE COURT: All right.

(Jury returns to the courtroom.)

THE COURT: Ladies and gentlemen, there are a number of matters which the Court and counsel had to take up this morning and as you know, certainly in a case like this there are many details that have to be discussed so that the case is put to you in a reasonable fashion and in a responsible fashion, that the material you receive is that which comes within the standards set forth by the statutes and by cases decided by Appellate courts on prior cases. At this time we are ready to proceed. Mr. Mellenger has some stipulations he will read to you. You shall consider the stipulations just as carefully and in the same manner as you would consider evidence of witnesses who testified in court under oath. Mr. Mellenger, when you are ready.

MR. MELLENGER: Thank you, your Honor. Remember I stated during my opening that some of the evidence would be stipulations, things that the defense and the Government have agreed upon and the defense and the Government have entered into four stipulations which I would like to read to you at this time. The first stipulation, "That if a Richard E. Pelland, Jr., who is a senior research clerk at the North Atlantic Service Center, Internal Revenue Service, Andover, Massachusetts were to testify at this trial, his testimony would be as follows:

That he has custody and control of the filing of records of the North Atlantic Service Center, Internal Revenue Service, relating to the filing of individual income tax returns; that such records are kept by the North Atlantic Service Center in the normal course of business", and that he would identify certain records which have been moved into evidence at this trial as being those business records, namely, the income tax returns of the defendant Joseph Gay which, as you have already heard, have been moved into evidence. Also as to what are known as certificates of assessments and payments relating to the years '66 through '71 which show the dates and payments made by the defendant to the Internal Revenue Service on his income tax liability.

The second stipulation is that, "If a representative of the Treasury Department, Bureau of Public Debt were to testify, his testimony would be as follows:

"That he has custody and control of the records of the Treasury Department, Bureau of Public Debt, and these records are kept in the normal course of business. That Government Exhibit Number 96 for identification is a record of the issuance and status of savings bonds numbers D-63298H".

The next number is M-1638596H. The next number M-3091051H. The next number is M-3343023H, and finally V-6165254H.

"That in November of 1954 bond number V-63298H was issued to Joseph Gay or Mrs. Stella Gay, 193 Wiemer Street, Buffalo, New York, in the denomination of $5,000 and remains outstanding.

"That in January of 1957 bond number M-1638596H was issued to Mrs. Stella Gay or Joseph Gay, 3 Fredro Street, Buffalo 6, New York, in the denomination of $1,000 and remains outstanding.

"That in January 1958 bond number M-3091051H was issued to Mrs. Stella or Joseph Gay, 3 Fredro Street, Buffalo 6, New York in the denomination of $1,000 and remains outstanding.

"That in July 1958 bond number M-3343023H was issued to Mrs. Stella Gay or Joseph Gay, 3 Fredro Street, Buffalo 6, New York, in the denomination of $1,000 and remains outstanding.

"That in July 1957 bond Number B-6165254H was issued to Mrs. Stella Gay or Joseph Gay, 3 Fredro Street, Buffalo 6, New York in the denomination of $5,000 and remains outstanding."

The next stipulation is, "That if Norman Senior, corporate secretary, Erie Federal Savings & Loan Association, 1989 Clinton Street, Buffalo, New York were to testify at this trial, his testimony would be as follows:

"That he has custody and control of the records of the Erie Federal Savings & Loan Association and that such records are made and kept in the normal course of the bank's business. That Government Exhibit Number 58 is the signature card for Erie Federal Savings & Loan Association, Account Number 67951419-8 in the name of Joseph J. and Stella Gay and also in that exhibit are the account history cards for the period December 30, 1966 through and including December 31, 1971.

"That Government Exhibit Number 59 is a savings account withdrawal slip relating to Account Number 67951419-8 in the name of Joseph and Stella Gay, 3 Fredro Street, Buffalo, New York, dated October 8, 1970 in the amount of $7,000 and that Government Exhibit 59-1 is an Erie Federal Savings & Loan bank draft Number 084641 payable to the order of Marine Midland Western dated October 8, 1970 in the amount of $4,000.

That Government Exhibit Number 60 is the signature card for the account Number CD9041 in the name of Joseph and Stella Gay and also the account history card for that account for the period October 8, 1970 through and including December 31, 1971, including the crediting of interest thereon.

"Government's Exhibit Number 60 is the signature card for Erie Federal Savings & Loan Association Account Number CD", - excuse me, I went back on myself there.

"That Government Exhibit Number 60-1

is a savings account withdrawal slip relating to account Number 67951419-8 in the name of Joseph and Stella Gay, 3 Fredro Street, dated October 8, 1970 in the amount of $12,000 and that Government Exhibit 60-2 is the corresponding savings account deposit slip for initial deposit on October 8, 1970 to Account CD9041 in the name of Joseph J. and Stella Gay.

"That Government Exhibit Number 60-3 are eight deposit slips relating to savings Account 679-514-19-8 in the name of Joseph or Stella Gay", and lastly, "That Government Group Exhibit 61 is related copies of Form 1099 which is a U. S. Information Return for the calendar year 1971 issued by the Erie Federal Savings & Loan Association to Jospeh or Stella Gay relating to interest of $753.26 paid or credited on Account CD9041 and also a Form 1099 which is another U. S. Information Return for the calendar year 1971 issued by the Erie Federal Savings & Loan Association to Joseph J. or Stella Gay relating to interest paid of $240.83 on Account 679-514198", and finally, the last stipulation is that, "If a representative of Hank Bokman Oldsmobile of Orchard Park were to testify, he would testify as follows:

"That he has custody and control of the records of Hank Bokman Oldsmobile, Inc., and that these records are made and kept in the normal course of business; that Joseph J. Gay, 3 Fredro Street, Buffalo, New York, purchased a 1969 Oldsmobile from Hank Bokman at a total cost of $3,719.42, February 8, 1969.

"That the documents contained in Government's Exhibit Number 89 are the documents relative to that purchase and they show a total settlement for that car of a deposit of $12.80 and cash on delivery of $3,706.62."

Also there are a number of documents which are certified copies of records kept by the Erie County Clerk pertaining to the mortgages which you have heard testimony about and the Government has moved these into evidence out of your presence and they have been accepted with no objection from Mr. Murphy. Government Exhibit 97 is the mortgage relating, or is a copy of the mortgage instrument relating to Mr. & Mrs. Bycina, and 98 is the Kaczmarek mortgage.

THE COURT: Mr. Mellenger, why don't you give us the date, the amount, and give us the correct names of the individuals involved.

MR. MELLENGER: Okay.

THE COURT: Is there any reference to the premises or is it merely described by metes and bounds?

MR. MELLENGER: It is described by metes and bounds.

THE COURT: No residence. Is there any property known as Number such and such a street there?

MR. MELLENGER: No, your Honor.

THE COURT: Give us the date, the amount and the individual.

MR. MELLENGER: 98 is a mortgage between, - 97 is the mortgage between John and Janet Bycina and Stella Gay in the amount of $10,000, dated the 6th day of April, 1960.

98 is a mortgage between Chester Kaczmarek and Irene Kaczmarek as mortgagors and Joseph Gay and Stella Gay dated the 6th day of May, 1963 in the amount of $6,000.

99 is a mortgage between Leonard Kocol and Nancy Kocol and Joseph and Stella Gay dated the 29th day of August, 1969 and that is in the amount of $5,000.

100 is a mortgage between Theodore and Gertrude Mazur and Stella Gay dated the 6th day of September, 1960 and that is in the amount of $2,000.

101 is a mortgage between Theodore and Gertrude Mazur and Stella Gay dated the 9th day of October, 1959 in the amount of $9,000.

102 is a mortgage between Edward Tokarczyk and Joseph Gay dated the

29th day of March 1963 and that is in the amount of $3,500.

Government Exhibit 103 is a mortgage between a Stanley and Clara Toporczyk and Stella Gay dated the 21st day of March, 1962 in the amount of $6,000.

Exhibit 104 is a mortgage between Gertrude Wisniewski and Stella Gay dated the 3rd day of June, 1968 in the amount of $7,000.

105 is a mortgage between Peter Wisniewski and Stella Gay dated the 21st day of June, 1956 in the amount of $9,000.

106 is a mortgage between Frank and Eleanore Mazurowski and Stella Gay dated the 11th day of August, 1971 in the amount of $6,000, and finally, 107 is a deed showing sale of property by Susan Wetzel dated the 14th day of July, 1971, the sale price is not indicated thereon. That concludes the documents, your Honor.

THE COURT: All right. That concludes your case except for the expert witness?

MR. MELLENGER: Yes, your Honor.

THE COURT: Ladies and gentlemen, I believe that it would be in the interest of orderly procedure if we adjourn now until next Tuesday. As I have already explained to you, I cannot be here tomorrow or Friday. Mr. Russo, the expert for the Government, is going to go over the figures we have heard here in the course of this trial and try to draw them all together and make an understandable statement out of what has gone so that this can be brought to your attention as clearly and as fairly as possible, so I would like to see the lawyers briefly after the jury leaves, but you may now go out with the Marshal and you are excused until next Tuesday morning at 9:30 when we will continue with the evidence in this case. You may go out with the Marshal.

(Jury escorted from the courtroom.)

THE COURT: Mr. Mellenger, generally speaking, is it your proposal to have some fairly large charts here?

MR. MELLENGER: Yes. One, I think more than likely we will have two large charts for viewing by the jury and also possibly a Government request to be able to pass schedules, photocopies of schedules to the jurors.

THE COURT: I think that is helpful to their understanding. When can you have these materials prepared, because it seems to me that it will help the progress of the case if Mr. Murphy can see your figures ahead of time and certainly if there are any mistakes or errors which he notes, he perhaps may like to call those to your attention right then or perhaps as far as the design or the wording. Sometimes the wording defense counsel does not like and that can be cleared up ahead of time. When can you have these materials?

MR. MELLENGER: Would Monday morning meet with the Court's approval?

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THE COURT: Mr. Russo, certainly by Monday morning. Why not then meet, Mr. Mellenger, with Mr. Murphy down in the United States Attorney's office at 9:00 o'clock Monday morning [illegible] can have a chance to examine and to know ahead of time and also to comment if you desire so that then if you want, we could meet during the day if there are some serious objections to something and make some arrangement with me.

MR. MELLENGER: Okay.

THE COURT: I will be here all day and we will meet and discuss the proposed charts so you can make corrections if necessary so that when the jury comes in, we can proceed right to it when they come in next Tuesday.

MR. MELLENGER: Fine, your Honor.

MR. MURPHY: Thank you, your Honor. All those arrangements sound good to me and I will try to meet them without any problem. Before we adjourn for the day, your Honor, and I assume that your ruling will have a great bearing on the charts that will be made. I did, however, object during the course of the trial to various documents that were attributable to Stella Gay alone as opposed to Joseph Gay. Your Honor admitted them and reserved the question of relevancy until such time, I assume, that the Government would rest its case.

THE COURT: They filed joint returns?

MR. MELLENGER: Yes, sir, and the indictment charges the joint income tax liability.

THE COURT: Then under that theory they would be admitted as to her, Mr. Murphy.

MR. MURPHY: Yes, your Honor. I am just raising the objection at the time. I don't propose to, - I am not at this time prepared to cite any law to your Honor that would exclude them. I am just arguing that the objection was made and your Honor did reserve decision and I assume now that you would admit these.

THE COURT: I would admit those particular exhibits.

MR. MURPHY: As being relevant?

THE COURT: Yes.

MR. MURPHY: Thank you, your Honor.

MR. MELLENGER: Your Honor, I would like to file the stipulations with the Court. However, I would like to photocopy those first.

THE COURT: Mr. Murphy, usually when we have, and especially because of the number of years involved, it would appear Mr. Russo's direct examination will be some time. It may be as long as the morning. I would think that we may well be into the afternoon as far as his testimony, but if we conclude Mr. Russo, I think if we have maybe some witness here.

MR. MURPHY: For Monday, your Honor, or Tuesday?

THE COURT: Tuesday afternoon.

MR. MURPHY: Yes. I will have a number of witnesses here, your Honor.

THE COURT: Because they could go very quickly too.

MR. MURPHY: Yes.

THE COURT: All right. Thank you. We will be in recess.

(Recess taken at 12:30 p.m.)

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

* *

THE UNITED STATES

-v-

CRIMINAL DOCKET
NO. 1974-143

JOHN V. GAY,

Defendant.

* *

Proceedings of trial held before the HON. JOHN T. CURTIN, and a Jury, in Part I, United States Court House, Buffalo, New York, resuming on April 6, 1976.

APPEARANCES:

RICHARD J. ARCARA, United States Attorney
by RICHARD MELLENGER, Assistant United
States Attorney.

ROBERT M. MURPHY, Esq., Attorney for
the Defendant.

* * * * *

PROCEEDINGS: April 6, 1976, 10:10 a.m.

APPEARANCES: As before noted.

(Defendant Present.)

(Jury Present.)

(Government's Exhibits Numbered 158, 159, 159-1, 159-2, 159-3, 160 marked for identification.)

THE COURT: Good morning, ladies and gentlemen. We are getting on and the Government will put on a witness who will explain this chart to you. I am going to say this to you probably six or seven times, even more before we are finished, but it is important to keep in mind that this is a summary of what the Government claims is the evidence in the case. You will find that when you listen to the witness that he will say, "Well, I got this information from such and such a source in the testimony", so that means that his conclusion here is only as good as the underlying testimony, is only as good as the exhibits he referred to and if you find for any reason at all that in your judgment that that testimony should be disregarded or discounted or the exhibits should only be applied in part that means that then you must necessarily apply a discount to the figures which appear on the chart. The chart is only a guide. It is only a help. It is not independent evidence standing by itself of the facts in this case and I say that to you because that is something we must keep constantly in mind as we listen to the testimony of the witness and as we make conclusions based upon his testimony. Furthermore, again it is most important that you withhold judgment here, that you listen just as carefully to cross examination of the witness as you do to the direct examination.

Mr. Mellenger, when you are ready.

MR. MELLENGER: Thank you, your Honor. The Government calls Joseph Russo.

JOSEPH A. RUSSO (296 Culpepper Road, Williamsville, New York), a witness called by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MELLENGER:

Q. Mr. Russo, where are you employed?

A. The Internal Revenue Service.

Q. And how long have you been employed there?

A. Twenty-six years.

Q. And what is your position?

A. I am an Internal Revenue Agent.

Q. Would you briefly describe your duties to the jury?

A. My duties as an Internal Revenue Agent are to audit and examine income tax returns of individuals, corporations, partnerships and any other type of income tax returns, also interpret the tax laws that apply to them.

Q. Okay, and during your career as a Revenue Agent approximately how many returns have you audited?

A. Oh, somewheres in the neighborhood of over 2,000 returns.

Q. And what steps do you take in auditing a tax return?

A. I start primarily with the original income tax returns and verify the returns to the taxpayer's books and records, do a verification through the records and again apply the income tax laws, the Revenue Code and regulations.

Q. And during the course of these audits, do you have occasion to recompute the income tax?

A. Yes, I do.

Q. Have you had any formal education in the tax laws or accounting?

A. Yes. I graduated from Bryant & Stratton with an Associate's Degree. It is a two-year extension course on accounting and tax and I went to Canisius College for other tax work and auditing and I also had what they call in-house training with the Internal Revenue Service. This is income tax and various other auditing techniques wherein you are trained by the Government.

Q. How many hours, approximately, of in-house training have you received from the Internal Revenue Service?

A. Oh, approximately a thousand hours.

Q. Now, you have been present throughout the entire course of this trial, haven't you?

A. Yes, I have.

Q. And did you make certain notes?

A. Yes, I did.

Q. Do you have those notes with you?

A. Yes, I do.

Q. May I have them, please?

A. Do you want them all?

MR. MELLENGER: I am marking these Court Exhibit Number 33.

(Court Exhibit Number 33 marked for identification.)

BY MR. MELLENGER:

Q. Since we have last adjourned on Wednesday of last week, did you have occasion to review these notes?

A. Yes, I did.

Q. And did you have occasion to review the exhibits which were introduced in evidence in this case?

A. Yes, I did.

Q. And based on your notes and your examination of the evidence, did you make certain calculations?

A. Yes, I did.

Q. Calling your attention to Government Exhibits 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 158 and 160, which you have in your possession, what are those?

A. These are various schedules that I prepared during my review in analyzing the records and evidence that was submitted into evidence by the various people.

Q. Okay, and you also have an Exhibit Number 159 on your possession, is that correct?

A. Yes, I do.

Q. And what is that?

A. This is a summary of sources and expenditures of funds analysis. It is my summary of an analysis wherein I analyze the sources of expenditures submitted in evidence for the years 1967 through 1971, inclusive, wherein it shows the excess of the funds over the sources and also my tax calculations.

MR. MELLENGER: Your Honor, I move Government's Exhibit Number 159 into evidence at this time and I request to be able to circulate copies of that exhibit to the jury.

THE COURT: Very well.

MR. MURPHY: No objection.

THE COURT: It may be marked in evidence and copies circulated to the jury. At the recess breaks, ladies and gentlemen, just leave these materials here right at your places on the chairs or on the bench in front of you.

(Government Exhibit Number 159 received in evidence.)

BY MR. MELLENGER:

Q. Mr. Murphy, - or Mr. Russo, I am calling your attention to Government Exhibit Number 159-1 which is the chart over here on the easel.

A. Yes.

Q. Do you recognize that?

A. Yes, I do.

Q. Would you identify that, please?

A. That is a chart that was prepared under my direction from the Exhibit 159 which is my summary of sources and expenditures of funds schedule.

Q. Okay. This is an extract of your schedule, of your summary of sources and expenditures of funds, is it not?

A. Yes,it is.

Q. Okay, and what portion does this extract from Government's Exhibit Number 159?

A. This represents the expenditures of funds portion of the total schedule.

Q. Now, calling your attention to the first line on this chart entitled "Bank balances and cash on hand increase at year end", wherein you show figures for the years

1967, '68, '69, '70 and '71, what was your source of information for those figures?

A. My source of information for these figures came from Government Exhibit Number 141 which is a schedule that I prepared.

THE COURT: Mr. White, would you give, - you may as we go along and I think it may be a good idea, ladies and gentlemen, as the witness refers to his source if you want to jot that information down on the sheets in front of you, you may do that. You may want that for future reference. It is up to you. If you want to do it, fine. It is up to you.

THE WITNESS: The schedules are marked, your Honor.

THE COURT: They are marked?

THE WITNESS: The hand-outs to the jury I have already marked. We have put in the Government Exhibit numbers.

MR. MELLENGER: It is on the left-hand side.

THE COURT: I see. It is on the left-hand side. Very well.

BY MR. MELLENGER:

Q. And you say your sources for the bank balances and cash on hand increase at year end came from Exhibit 141 which is a schedule you prepared?

A. Yes, it is.

Q. Okay, and did you perform an analysis on that schedule, Exhibit 141?

A. Yes, I did.

Q. And what analysis is performed on that schedule?

A. My analysis consisted of the year-end bank balances and the cash on hand beginning with the year 12-31-66 to 12-31-71, inclusive.

Q. You said it includes year-end bank balances?

A. Yes, it does.

Q. And what do you do with those year-end bank balances?

A. I compared the year-end bank balances of one year with the bank balances at the end of the subsequent year and that results in an increase or a decrease in the bank balance.

Q. Did you take into account the bank balances at the Marine Trust Company?

A. Yes, I did.

Q. Okay, and what was your source of information for those balances?

A. My sources for the Marine Bank came from Government

Exhibits Number 16, 17, 18, 19, 20, which evidence was submitted by Mr. Robert Clark of the Marine Trust Company and this consisted of a checking account under the name of Gay Printing, a savings account under the name of Joseph Gay and another savings account under the name of Joseph and Stella Gay and a savings certificate account under the name of Joseph and Stella Gay.

Q. Okay, and did you take into account the accounts at the Buffalo Savings Bank?

A. Yes, I did.

Q. What was the source of that information?

A. My source of information for the Buffalo Savings Bank came from Government Exhibits Number 27, 29, 31, 33, 35, 37, 38, 39, 41, 43, 45 and 51 as submitted by witness Mr. Walter Herr of the Buffalo Savings Bank.

Q. Which exhibits were those?

A. This consisted of a savings account under the name of Joseph Gay. Do you want me to read the account numbers?

Q. Yes.

A. Account Number 763292 under the name of Joseph Gay. Account Number 763298 under the name of Stella Gay. Account 760861 under the name of Joseph and Stella Gay. Account 760865 under the name of Joseph Gay as trustee for Stella Gay; Account 760864 under the name of Stella

Gay as trustee for Joseph Gay; Account 760862 under the name of Stella Gay as trustee for Lorraine Gay; Account 760863 under the name of Joseph Gay as trustee for Dorothy Gay; Account 809654 under the name of Joseph Gay as trustee for Joseph Gaj, spelled G-a-j; Account S-20284 under the name of Joseph Gay or Stella Gay; Account S-52546 under the name of Joseph Gay as trustee for Dorthy Gay; Account S-52547 under the name of Joseph Gay as trustee for Lorraine Gay; Account 17-11604-6 under the name of Joseph Gay or Stella Gay and this is a special term account.

Q. Okay, and did you take into account the accounts at the Erie Federal Savings & Loan Association?

A. Yes, I did.

Q. What was your source of that information?

A. My source of information for these accounts came from Government Exhibits Number 58 and 60 which testimony was stipulated to by Mr. Norm, - Mr. Seaver of the Erie Federal Savings & Loan Bank.

Q. Okay, and did you take into account an account at the Erie County Savings Bank?

A. There were two accounts, Account Number 679-51419 under the names of Joseph J. or Stella Gay and Account CD-9041 under the name of Joseph or Stella Gay.

Q. And did you take into account an account at the Erie

County Savings Bank?

A. Yes, I did.

Q. What was your basis for the source of that information?

A. That came from Government Exhibit Number 62 which was introduced into evidence by Mr. Vassar of the Erie County Savings Bank.

Q. What account number was that?

A. That was Account Number 106021, and under the names of Joseph or Stella Gay and that is a savings certificate.

Q. Okay. Did you take into account any cash on hand the defendant may have had?

A. Yes, I did.

Q. And what was your basis for those amounts?

A. My basis for this information came from the testimony of Special Agents Krysztof and Special Agent Quinn as related to them by Mr. Gay and this relates to cash on hand which, - in the amount of $2,000 as of 12-31-66 and accumulated cash in a mattress of $11,000 as of 12-31-66. This was on a statement by Mr. Gay to Mr. Quinn relative to information Mr. Gay received from his wife that she had stored this money in a mattress.

Q. You said you took the year-end balances of all these accounts and totaled them?

A. Yes, I did.

Q. What was the total year-end balances as of December 31, 1966?

A. The total year-end balances of all the accounts, Marine Trust, Buffalo Savings, Erie Federal, Erie County Savings and cash on hand amounted to $117,348.28.

Q. Okay, and what was the cash on hand balance on December 31, 1967?

A. Cash on hand?

Q. Or total cash in bank and on hand.

A. Total bank balances and cash on hand as of 12-31-67 amounted to $147,865.77.

Q. Okay. Calling your attention to Government's Exhibit Number 159-1 we show the cash on hand increases for the year 1967, how did you determine that figure?

A. I determined this figure by taking the 12-31-67 bank year-end balances in the amount of $147,865.77 and subtracted the prior year-end balance as of 12-31-66 in the amount of $117,348.28, arriving at a net increase of $30,517.49.

Q. Okay, and calling your attention to the year 1968, how did you determine the increases for that year?

A. I determined the increase in the same manner, wherein the total bank balance and cash on hand as of 12-31-68 came to $165,087.76. I subtracted out the prior year-end balance of $147,865.77, arriving at a net increase of $17,221.99.

Q. Okay, and in the year 1969, how did you determine the bank balance and cash on hand increase?

A. On 12-31-69 I applied the same method and arrived at a total year-end bank balance and cash on hand of $179,390.29. I subtracted out the prior year of 12-31-68 balance of $165,078.84 arriving at a net increase of $14,211.45.

Q. Okay, and for the year 1970 there is a zero in the bank balance and cash on hand increase columns.

A. For the year 12-31-70 we end up with a zero on that part of the schedule because the end result was a decrease in bank balances. The total bank balances and cash on hand as of 12-31-70 amounted to $41,178.85. I compared this to the prior year-end balance of 12-31-69 of $179,390.29, arriving at a decrease of $138,211.44. Now, this shows up elsewhere on this schedule.

Q. And for the year 1971, how did you determine that figure?

A. For the year 12-31-71 I arrived at the figure in the same manner wherein I took the total bank balances and cash on hand which amounted to $95,772.53, subtracted out the prior year-end balance of 12-31-70 of $41,178.85, arriving at a net increase of $54,593.68.

Q. Why do you treat increase in bank balances and cash on hand as an expenditure of funds in your schedule?

A. Because it is exactly such. It is an increase in the cash. There is more cash went into the bank than came out, so therefore we consider it the same as an expenditure. You are buying an asset, so to speak.

Q. Calling your attention to the next line on the chart, which is purchases of Government bonds for the years '66, '67, '68, '69 and '71, there are no figures in there, but in the year 1970 there is a purchase shown in the amount of $179,396.24. What is your source for that amount?

A. My source of information for this amount came from Government Exhibit 145 which is a schedule that I prepared.

Q. Okay, and what information do you show in that schedule?

A. This schedule shows information relative to the purchase of Government bonds by the defendant as evidenced by Government Exhibit Number 64 and submitted into testimony by Mr. Glenn Roll of the Marine Midland Municipal Company. The first bond that was acquired was a Federal Intermediate Credit Bank bond, 8.15 per cent with a par value of $80,000. This was acquired on 4-1-70 for a total cost of $80,525.22. The difference was the interest that accumulated on the bond. The next item was Government Exhibit Number 65 and this was for a

New York City, New York bond, 6.70 per cent, par value of twenty-five thousand, purchased on 10-13-70 for a gross amount of $25,813.83. Under Government Exhibit Number 66 was a New York City, New York bond, 5 and a half per cent, $25,000 par value acquired 10-13-70 for a gross amount of $25,272.94. The next item in evidence was Government Exhibit Number 67 which was for a New York City, New York bond, 6 per cent, $25,000 par value required 10-13-70 for a gross amount of $25,732. The next item was Government Exhibit Number 68 which was for an Albany County, New York Southern Mall bond, 3.75 per cent, $25,000 par value, acquired 10-13-70 in a gross amount of $22,052.25.

Q. Did you total these purchases up?

A. Yes. The total purchases grossed to one hundred seventy-nine thousand three hundred seventy-three twenty-four.

Q. And why do you only show an amount for 1970?

A. 1970 is the only year evidence was submitted into testimony that Mr. Gay acquired any of these type bonds.

Q. Calling your attention to the third line on the chart which is entitled "Purchases of stocks or bonds", what is your source of information for the figures entered on that line for '67 through '71?

A. My source of information for this came from Government

Exhibit Number 140 which is also an exhibit that I prepared, a schedule that I prepared.

Q. Okay, what is shown on that schedule?

A. Shown on this schedule is a detailed, - is a breakout of the securities acquired by Mr. & Mrs. Gay throughout the years 1967 and 1971, - throughout 1967 and 1971 inclusive, and as evidenced by the various exhibits and I can read them off to you.

Q. What was your source for the information on this schedule?

A. Okay. My source of information came from Government Exhibit Number 70 and 71 which were statements relating to purchases as produced by Mr. Stevenson of the Loeb, Rhoades Company, Government Exhibits Numbers 73 and 74 which were statements as introduced by Mr. Vitanza from the Shields & Company, Buffalo office; Government Exhibits 150, 151, 152 which were also statements introduced by Mr. Melvin Panzer from Loeb, Rhoades, New York City, and Government Exhibits 114, 115, 116, 118, 119, 120 and 121. These were statements and confirmations of buy and sell orders as submitted by Mr. Gay to Special Agent Quinn.

Q. Okay, and what purchases do you have listed on your schedule for the year 1967 and also could you tell the jury what exhibit numbers you got these purchases from?

A. Yes, I can. In 1967 Exhibits 73 and 114 showed that Mr. Gay purchased Niagara Mohawk stock in the amount of $4,079.26. It also showed Mrs. Gay purchased Niagara Mohawk stock in the same amount of $4,079.26.

Q. And what was the total amount of purchases in 1967?

A. In 1967 the total stock purchases amounted to eight thousand one fifty-eight fifty-two.

Q. Okay, and what purchases do you show for the year 1968 and what is your source for those amounts?

A. In 1968 Government Exhibits Numbers 73 and 74 showed that Mr. Gay bought U. S. Borax, $3,021.44, Mrs. Gay bought a similar amount for $3,021.44. Total amount for '68 being $6,042.88.

Q. Okay, and calling your attention to the calendar year 1969, what purchases do you show on your schedule for that year and what is your source of information?

A. In 1969 Government Exhibits Number 151 and 115 show that Mr. Gay purchased $8,034.49 worth of General Motors stock. Government Exhibit 151 and 116 show that Mr. Gay purchased Niagara Mohawk stock of $2,102.75. Same exhibits show that Mrs. Gay purchased $2,115.38 of Niagara Mohawk stock. Government Exhibits 151 and 70 showed Mrs. Gay purchasing Niagara Mohawk stock in the amount of $9,251.25. Same exhibits showed Mr. Gay as having purchased Niagara Mohawk stock in the amount of

$9,251.25. Government Exhibits Number 151 and 117 show, which were stock purchases of Phillips Petroleum showed that Mrs. Gay acquired Phillips Petroleum of $7,208.66. Mrs. Gay again acquired Phillips Petroleum under Exhibits 151 and 70 for $5,640.88 and under Government Exhibits 152 and 71 Phillips Petroleum was purchased by Mr. Gay in the amount of $5,640.88. These totals for the year '69 amounted to forty-nine thousand two forty-five fifty-four.

Q. What purchases does your schedule show for the year 1970?

A. For 1970 my schedule shows under Government Exhibits 150 and 118 under the joint names of Joseph and Stella Gay a bond was acquired from the General Acceptance Corporation in the gross amount of $10,096.81. Under Government Exhibits 150 and 119 under the joint name of Joseph and Stella Gay Niagara Mohawk stock was again acquired in the amount of $4,408.25. Under the same exhibits another purchase was made under the joint names of Joseph and Stella Gay in the amount of $1,597.75. Total stocks purchased in 1970 amounted to $6,502.81.

Q. In 1971 what purchases are shown?

A. In 1971 under Government's Exhibits 150 and 120 under the name of Joseph Gay Fruehauf Finance bond was purchased in the amount of $10,117.75 and under

Government Exhibit 152 and 121 Mrs. Gay acquired Fruehauf Finance also in the amount of $10,117.75. Total purchase for the year amounting to $20,235.50.

Q. Okay, and calling your attention to the next line on the chart, "Mutual Funds reinvested, dividends and capital gains", what was your source of information for the figures entered on that line?

A. Source of information came from Government Exhibit Number 147 which is a schedule that I prepared relative to the Mutual Funds reinvested by Mr. & Mrs. Gay.

Q. And what was your source of information for that schedule?

A. My source of information came from Government Exhibit Number 153 which was introduced into evidence by, - which is the Dreyfus Fund which was introduced into evidence by Mr. Walter Harris of the Bank of New York and Government Exhibit Number 154 which is the Anchor Growth which was known earlier as the Diversified Growth and that was introduced by Mr. Toth of the First National Bank of Jersey City.

Q. Okay, and what mutual funds do you show reinvested in the year 1967?

A. In the year 1967 Mr. Gay earned dividends of $582.16, of which $568.83 was reinvested into the Dreyfus Fund. The $13.33 difference is the result of custodian fees which are charged by the mutual fund. The dividend earned under the Anchor Growth Fund amounted to $125.37. That was also reinvested and the capital gain distribution was reinvested in the amount of $1,112.78. This totaled to $1,806.98 for the year 1967.

Q. Okay, and what mutual funds reinvestments do you show for the year 1968?

A. For 1968 the Dreyfus Fund was reinvested with earned dividend of $840.14 less custodian fees of $12.80. Net reinvestment being $827.34. The Anchor Growth was reinvested to the extent of the earned dividend of $128.72 and a capital gain distribution of $1,060.71. Total reinvestment for '68 being $2,016.77.

Q. Okay, and for the year 1969?

A. The year 1969 the total, - the reinvestment from the Dreyfus Fund came from earned dividends of $2,111.87 less custodian fee of $12.87, giving a net reinvestment of $2,099. The Anchor Growth Dividend amounted to $180.75 which was also reinvested and the capital gain distribution for the Anchor Growth of $1,169.54. The total reinvestment for the year 1969 amounted to $3,449.29.

Q. Okay, and for the year 1970.

A. For the year 1970, the Dreyfus Fund dividend earned was $1,070.07 less a custodian fee of $12.97, a net of $1,057.10 was reinvested. The Anchor Growth dividends earned amounted to $248.68. These were reinvested and the capital gain distribution of $279.35 was also reinvested. Total reinvested in mutual funds for 1970 amounted to $1,585.13.

Q. And for 1971?

A. And for 1971, the Dreyfus Fund had an earned dividend of $562.61 less custodian fee of $12.85, giving a net reinvestment of $549.76. Anchor Growth was a dividend of $202.32 being reinvested. There was no capital gain distribution that year. Total reinvestment for the year '71 for the mutual funds amounted to $752.08.

Q. And calling your attention to the next line of that schedule, "Paid life insurance premiums", what is your source of information for the figures on that line?

A. My source of information for this item comes from Government Exhibit Number 148 which is a schedule that I prepared relative to the net life insurance premiums paid by Mr. Gay during the years 1967, '68, '69, '70 and '71 inclusive.

Q. And what is your source of information for the figures on that line?

A. My source of information came from Government Exhibit Number 155 which is the premium history, Government Exhibit Number 156 which are the cancelled checks, and

Government Exhibit Number 157 called the dividend history. These came from the John Hancock Mutual Life Insurance Company as introduced by witness Mr. William Bennett and the Prudential Insurance Company, Government Exhibits were Government Exhibit Number 91. There is a series of those and this evidence was introduced by Mrs. Shirley Fitzgerald of the Prudential Insurance Company.

Q. Okay, and what paid life insurance premiums do you show for the year 1967?

A. For the year 1967 I show a total paid life insurance premium of $826.10 which is made up of the John Hancock policy Number 8611802 showing an annual premium paid of $242.40 less accumulated dividends and interest which netted out the premium to $218.39 and under Prudential Insurance Company there was a policy number 26-560-217 and this is Government Exhibit Number 91. The annual premium paid on that was $571.84 less accumulated dividend and interest of thirty-four ninety-three, net of five thirty-six ninety-one. Policy Number 20-133-633, Government Exhibit Number 91-1, there was nothing paid in 1967. It was prepaid in the year 1966. Policy Number 17-567-003, Government Exhibit Number 91-2, the net premium amounted to $70.80. Total premiums were eight twenty-six ten.

Q. Okay, and for the year 1968, what life insurance premiums do you show paid for that year?

A. For the year 1968 under policy, - do you want to repeat the policy numbers?

Q. No, just the --

A. This was under John Hancock Mutual policy. The net premium was $214.78. Under the Prudential Insurance Company, the respective policies were $523.31 net; $1,477.52 net and $70.80 net, total of $2,286.41.

Q. Okay, and for 1969?

A. In 1969 starting with John Hancock Mutual, the net was $210.92. The first policy with Prudential was $508.91. The second policy was $1,427.76 and the third policy was $67.70. Total premiums of $2,208.36.

Q. And for 1970?

A. 1970 John Hancock Mutual net premium was two 0 six eighty. Prudential Insurance Company first policy, the net premium was four eighty-four sixty-five. The second policy was one thousand three hundred forty-nine twenty-two. The third policy was $64.15, totaling $2,104.82.

Q. And finally for 1971?

A. In 1971 the net premium for John Hancock Mutual was $201.38. Under the Prudential Insurance Company Policy Number 1 was $457.95. The net premium for

Policy Number 2 was $1,214.31 and Policy Number 3 was $58.10, the total being $1,931.74.

Q. Okay, and calling your attention to the next line on that schedule, "Federal Income and Social Security taxes paid", what was the source of your information for the amount on that line?

A. The source of information for this amount came from Government Exhibit Number 149 which is a schedule that I prepared.

Q. Okay, and what information is shown on that schedule?

A. My schedule shows the actual income taxes, estimated taxes, withholding taxes and Social Security taxes paid by Mr. Gay for the years 1967, '68, '69, '70 and '71.

Q. What was the basis for your information shown in that schedule?

A. The basis for my information came from Government Exhibits Number 11, 12, 13, 14, 15, 16, which are Internal Revenue Service records maintained at Andover, Massachusetts known as certificates of assessment and payments per Government Exhibits, - also Government Exhibits Number 7 and 8 which are the income tax returns for the years 1970 and '71 were also used and this was evidence which was stipulated testimony.

Q. And for the year 1967 what federal income and Social

Security tax paid do you show for that year?

A. In 1967 the total amount paid was $1,081.47 and consisted solely of three estimated tax payments and the 1966 return remittance attached to that return which was paid in 1967. There was no Social Security paid in that year.

Q. What was the source of the remittance for the 1966 return and in what amount?

A. The '66 return?

Q. Yes.

A. The remittance for that was $331.44.

Q. And what was the source for that?

A. Government's Exhibit Number 11.

Q. You said there were estimated taxes. What amounts were those and how many payments?

A. Government Exhibit Number 12, estimated tax payment on 4-24-67 in the amount of $250. An estimated tax payment on 6-13-67 of $215 and on 9-15-67 an estimated payment of $250, the total being $1,081.47.

Q. Okay, and what payments do you show for the year 1968?

A. In 1968 the payments came under Government Exhibits Number 12 and Number 13. Exhibit Num[illegible] shows a 1967 return filed and paid with remi[illegible] of $1,564.66, an estimated tax payment on 1-3-68 of $250.; an estimated tax payment on 12-2-68 of $41.60. I am sorry, that is not an estimated tax payment. That is an estimated tax penalty. Government Exhibit Number 13, 4-16-68 there is an estimated tax payment of $400 and on 6-10-68 an estimated tax payment of $400; on 8-29-68 an estimated tax payment of $400 and on 12-27-68 an estimated tax payment of $400, total being $3,456.26.

Q. Okay, and for the year 1969?

A. 1969 came from Government Exhibits Number 13 and 14. Government Exhibit Number 13 shows the 1968 return filed with remittance in the amount of $874.65. It also shows on 12-22-69 an estimated tax penalty of $12 was also paid. On Government Exhibit Number 14 shows an estimated tax payment on 4-30-69 of $600; an estimated tax payment on 6-18-69 of $600; on 9-15-69 an estimated tax payment of $600 and on 12-29-69 another estimated tax payment of $600, total payments being $3,286.65.

Q. Okay, and what payments were shown for the year 1970?

A. 1970, Government Exhibits Number 14 and 15 and Number 7. Government Exhibit Number 14 shows the 1969 return filed with remittance of $530.03 and Government Exhibit Number 15 shows an estimated tax payment on 4-17-70 in the amount of $700; on 6-8-70 an estimated tax payment of $700; 9-9-70 an estimated tax payment of $700 and under Government Exhibit Number 7 which is the income tax return and the W2 Form that is attached to it shows the 1970 Federal withholding tax in the amount of $931.42 and the employee's share of the Social Security tax of $337.44, total being $3,889.89.

Q. Okay, and what payments are shown for the year 1971?

A. 1971 is evidenced by Government Exhibits Numbers 15, 16, and Number 8. Government Exhibit Number 15 shows an estimated tax payment on 1-25-71 in the amount of $700, and Government Exhibit Number 16 showed an estimated tax payment on 4-20-71 in the amount of $464.33; on 6-6-71 an estimated tax payment of $700; on 9-21-71 an estimated tax payment of $700 and under Government Exhibit Number 8 which is the tax return and the withholding, the W2 slip the 1971 Federal withholding tax was $1,204.84, the Social Security tax employee's share only, $405.60; total tax paid was four thousand one seventy-four seventy-seven.

Q. Okay, and as to the line, "Itemized deduction per tax return", what was your source of the figures entered on that line?

A. Government Exhibit Number 158, also a schedule I prepared relative to Mr. Gay's itemized deductions per the tax returns for the years 1967 through 1971, inclusive.

Q. And those would be Government Exhibits 4, 5, 6, 7 and 8.

A. Government Exhibits Numbers 4, 5, 6, 7 and 8 are the original tax returns as prepared by Joseph and Stella Gay. I mean as filed by Joseph and Stella Gay.

Q. Calling your attention to the year 1967, how did you calculate the amount of $1,607.98?

A. Under the itemized deduction section of the tax return, Mr. Gay showed, - the itemized deductions totaled $1,495.42 to which I added $112.56. This represented one-half portion of the medical insurance premium which is not allowed. The total deduction taken into account as an expenditure for that year is $1,607.98.

Q. Okay, and for the year 1968, how did you arrive at the figure $1,962.29?

A. This was Government Exhibit Number 5. The total itemized deductions on the 1968 return were $1,849.73 to which I added the one-half medical insurance premium not allowed of $112.56, total, $1,962.29.

Q. Okay, and for 1969?

A. For 1969 Government Exhibit Number 6 which is also the tax return. I did my deductions as shown per tax return were $3,172.29 to which I made adjustment or I reduced this amount by $1,239 and I added the one-half medical insurance premium of $112.56. The net adjustment taken, the net figure taken into account was $2,045.85. The reduction of $1,239 is result of the casualty loss claimed on the tax return by Mr. Gay.

Q. You said that is a result of the casualty loss claimed on the tax return for 1969?

A. Yes, I did.

Q. Why do you reduce itemized deductions by that amount?

A. Well, mainly because this is not an expenditure for 1969. This is one of the items he had on hand prior to 1969 and not an expense of that year.

Q. Mr. Russo, we skipped a few lines going down through the chart. I call your attention to --

A. Do you want me to finish these?

Q. I am sorry, yes. As to 1970 what were the itemized deductions which you allowed as an expenditure

A. 1970 under Government Exhibit Number 7 which is the 1970 tax return, the itemized deductions per the return two thousand two fifty-nine eighty-two to which I added the not allowable one-half medical insurance premium of one twelve fifty-six, amounting to a total of $2,372.38.

Q. And for 1971 how did you arrive at the itemized deductions for that year?

A. This came from Government Exhibit Number 8 which is the 1971 income tax return. Itemized deductions per the return were two thousand four twenty-eight twenty-nine. Again I adjusted and added the one-half medical insurance premium not allowed of $112.56, arriving at a total of two thousand five forty eighty-five.

Q. There are a number of lines we have skipped over. I am calling your attention to the fifth line down which is a purchase or real estate which shows a $3,000 expenditure of funds in 1971. What was your source for showing that $3,000 expenditure of funds?

A. The purchase of real estate for the year 1971 came from Government Exhibit Number 107 and which is identified as a certified deed from the Erie County Clerk's office. This deed is dated July 14, 1971 between Susan Wetzel and Joseph Gay relative to the sale and purchase of some real estate.

Q. Did you have any other source for the information such as the amount?

A. On the bottom of the indenture it says there is a real estate transfer tax, State of New York, of $3.30 which represents a $3,000 purchase because the transfer tax is $1.10 per thousand.

Q. Okay, and was there any other source for your entry of $3,000?

A. Yes. The testimony of Special Agent Quinn on information submitted to him by Mr. Gay.

Q. Okay. Now, the line underneath that, the purchase of the automobile shows an expenditure of funds of $3,706.62

in 1969. What was your source for that information?

A. That came from Government Exhibit Number 89 which was stipulated. Government Exhibit 89 is an invoice from the Hank Bokman Oldsmobile Company showing a net purchase of $3,706.62.

Q. Calling your attention to the line underneath that, "Funds invested in mortgages and other loans", you show a $7,000 investment in 1968, a $5,000 investment in 1969, a $1,200 investment in 1970 and in 1971 a $6,000 investment. What was the source for that information?

A. Source of information came from Government's Exhibit Numbers 99, 104 and 106 as well as from the testimony of Mr. Frank Mazurowski.

Q. Again handing you Government Exhibits 99, 104 and 106. Now, as to the $7,000 expenditure shown in 1968, which exhibit did you get that information from?

A. I got this from Government Exhibit Number 104 which is a certified copy of the bond and mortgage as recorded in Erie County Clerk's office and this is dated June 3, 1968 which is between Gertrude Wisniewski and Stella Gay in the amount of $7,000.

Q. Okay, and the expenditures shown in 1969, what was your source for that expenditure of $5,000?

A. In 1969 this is evidenced by Government Exhibit Number 99 which is also a bond and mortgage certified copy of the Erie County Clerk's office and it is dated August 29, 1969 and it is between Leonard Kocol, spelled K-o-c-o-l and his wife Nancy and Joseph and Stella Gay, and this is in the amount of $5,000.

Q. Okay, and the expenditure of funds of $1,200 in 1970.

A. In 1970 the $1,200 expenditure represents a personal loan as testified by Mr. Frank Mazurowski. This was made to him in 1970.

Q. And the $6,000 expenditure shown in 1971?

A. In 1971 again there was a bond and mortgage recorded at the Erie County Clerk's office under Government Exhibit Number 106 and this was dated August 11, 1971. It is between Frank and Eleanore Mazurowski and Stella Gay in the amount of $6,000.

Q. And calling your attention to the second-last line, "Miscellaneous legal fee", which shows an expenditure $500 in 1970, what was your basis for that information?

A. This came from Government Exhibit Number 93 which is a copy of the general ledger card from the legal firm of Condon, Klocke, Ange & Gervase, a retainer fee paid by Mr. Gay on, I think it was, 9-29. No, it was, - I have another note on that. That was paid on August 27, 1970 by, - from his checking account, the Gay Printing account, Check Number 1276.

Q. Okay, and the last line there, the purchase of the

Treasury Note, what was your basis for that information?

A. The purchase of the Treasury Note of $10,000, this was based on the testimony of Special Agent Quinn on a statement given to him by Mr. Gay.

Q. Okay, and what were your total expenditures for the year 1967?

A. The year 1967 the total expenditures amounted to $43,998.54.

Q. And for the year 1968?

A. Total expenditures amounted to $39,986.60.

Q. And 1969?

A. $82,855.50.

Q. For 1970?

A. $217,560.27.

Q. And for 1971?

A. $93,228.32.

Q. Mr. Russo, again calling your attention to Government's Exhibit Number 159-2, do you recognize that?

A. Yes, I do.

Q. And what is that?

A. That is the sources of funds portion of the Government Exhibit 159, the summary schedule.

Q. And that is another extract?

A. That is an extract, yes, sir. The chart was prepared by someone else under my direction.

Q. I am handing you Government Exhibits 4, 5, 6, 7 and 8 which are the tax returns for 1967 through 1971 I notice you have what is shown on there as tax return items.

A. Yes.

Q. Okay. Now, for the first line, "Adjusted gross income per tax return", what is your source of information?

A. Government Exhibit Number 4 is the 1967 income tax return for Joseph and Stella Gay.

Q. And what amount of adjusted gross income is shown on that return?

A. The adjusted gross income for that year was $15,914.04.

Q. Okay, and for '68 what is your source of information for that?

A. '68, Government Exhibit Number 5 which is the 1968 individual income tax return for Joseph and Stella Gay, and adjusted gross income for that year was $15,217.71.

Q. Okay, and the source of information for 1969?

A. 1969 was Government Exhibit Number 6 which is the individual income tax return for Joseph and Stella Gay and the adjusted gross income for that year was seventeen thousand eight 0 six ninety-two.

Q. And for 1970?

A. For the year 1970 came from Government Exhibit Number 7 which is the U. S. Individual Income Tax return for Joseph and Stella Gay. The adjusted gross income was $20,046.58.

Q. And for 1971?

A. 1971, Government Exhibit Number 8 which is the 1971 individual income tax return for Joseph and Stella Gay. Adjusted gross income was $23,060.87.

Q. Calling your attention to the next line, "Funds available, capital gains transaction, sale of securities", what was your source of information for that line?

A. This would be the Government Exhibits Numbers 4, 5, 6 and 7 again which are the income tax returns for the years '67, '68, '69 and '70, respectively. What this actually amounts to is the gross receipts or the gross selling price of the securities that were sold in these respective years to the amount as shown per my schedule.

Q. That would be the total amount of funds received?

A. Right, the gross amount on the Schedule D portion of the individual income tax return.

Q. Okay, and what total funds received for the year 1967 do you reflect on that schedule?

A. 1967 shows a gross receipts of sales of $12,048.50. 1968, - I am sorry, you didn't ask me.

Q. And for 1968?

A. $1,581.72.

Q. For 1969?

A. $7,944.44.

Q. 1970?

A. $892.47.

Q. And 1971?

A. There were no capital gains transactions.

Q. Calling your attention to the next line on that schedule, "Less taxable portion, capital gains and adjusted gross income".

A. Yes.

Q. I notice that those numbers have brackets around them. Why did you place brackets around those numbers?

A. Well, brackets in accounting represent deductions or negative figures.

Q. Okay, so that is actually a subtraction from the total shown on there?

A. That is correct.

Q. Okay. Why are you subtracting those figures from the total shown?

A. Well, according to Government Exhibits Numbers 4, 5, 6 and 7 which again are the income tax returns, this represents the taxable portion of the capital gain which has already been included in the first line under the adjusted gross income portion of the return and again has been included into the gross portion of the capital gains transactions so therefore it has to be reduced.

Q. That is already included once in adjusted gross income?

A. Right.

Q. And once in funds available from capital gains transactions

A. Right.

Q. Okay. So it is included twice in the figures above, is that correct?

A. That's right. It is merely an adjustment. This is the simplest way to explain it and show it.

Q. Okay. What do you show for taxable portions of capital gains transactions, 1967?

A. What do I show as taxable gains?

Q. Yes.

A. In '67 it was $4,638.08.

Q. And in '68?

A. $790.86.

Q. And in '69?

A. $2,099.48.

Q. 1970?

A. $496.23.

Q. And 1971?

A. There were none, no transactions.

Q. Calling your attention to the non-taxable dividends, what was your source of information which is the next line, what is your source of information for the figures on that line?

A. This information is obtained again from Government

Exhibits 4, 5, 6, 7 and 8 which are the income tax returns for the years '61 through '71, inclusive and respectively. This information is right on the returns and basically it is the dividend exclusions and those portions of the dividends that are regarded as not being taxable but they show up on the tax return in the gross amount of dividends reported.

Q. Dividends are reported in the gross amount, are they not?

A. That's correct.

Q. And then deducted out are non-taxable portions?

A. Non-taxable portions as stipulated to by various companies as to which is taxable and non-taxable and also the automatic $200 exclusion which is allowed to joint holders of dividends.

Q. Okay. What is your non-taxable portion for 1967?

A. In 1967 the combined non-taxable portion was $1,643.04.

Q. In 1968?

A. 1968 was $200.

Q. And '69?

A. $4,229.41.

Q. 1970?

A. $200.

Q. 1971.

A. $2,668.40.

Q. Okay. Calling your attention to the next line on that schedule, "Omitted taxable income, interest", what was your source of information for the figures entered on that line?

A. This information comes from Government Exhibit Number 143 which is also a schedule that I prepared based on various Government Exhibits for each of the respective years.

Q. And what information do you show on that schedule?

A. Under, - for the year 1967?

Q. No.

A. Oh, what information. Oh, I am sorry. Government Exhibit Number 60 which is an account ledger account from the Erie Federal Savings & Loan Association; Government Exhibit Number 94 which are the cancelled checks from Selective Enterprises; Government Exhibit Number 69 which is a statement from the Marine Midland Municipal Company relative to municipal securities purchased and interest thereon as introduced by Mr. Roll of the Marine Midland Company; Government Exhibit Number 75 which are Mr. Gay's mortgage sheets relative to the Bycina mortgage; Government Exhibits Number 78 and 79 which were also mortgage sheets submitted by Mr. Gay and these are for the Mazur mortgage. Number 78 was, - yes, this is for the Mazur, M-a-z-u-r mortgage and Government Exhibit Number 80 which was also mortgage sheet submitted by Mr. Gay relative to the, - I don't know how to pronounce this. I am going to have to spell it. It is T-o-k-a-r-c-z-y-k mortgage and also to, - these were not Government exhibits but was testimony submitted by Mr. Frank Mazurowski relative to his personal loan and also to Defense Exhibit Number 16 relative to a $10,000 Treasury Note received.

Q. Okay, and you said you used as one of your sources Government Exhibit Number 60 which is the account ledger from the Erie Federal Savings & Loan Association. What amounts of interest and for what years did you find omitted from that exhibit?

A. This applied to the year 1970. It was the fourth quarter interest on account Number CD9041 for $182.84.

Q. Okay, and the cancelled checks, Exhibit Number 94 from Selective Enterprises, Inc., what amounts and for what years omitted interested did you find in there from that exhibit?

A. Cancelled checks as introduced by Mr. Glieco of Selective Enterprises, Incorporated show omitted interest in each of the respective years '67, '68, '69, '70 and '71 of $120.

Q. Okay, and relative to Exhibit Number 69 which is the letter from Mr. Glenn Roll stating the due dates of the coupons on the purchase of bonds and also the amounts, what amounts and what years do you find omitted from that exhibit?

A. The Marine Midland Municipal statement showed that a coupon payable on 9-1-70 relative to the $80,000 Federal Intermediate Credit Bank bond interest of $3,241.89 was omitted in 1970.

Q. And how about '71?

A. In '71 a second coupon was payable on 3-1-71 and this was omitted. This was $3,260, and on 9-1-71 the third coupon was payable and that was omitted as $3,260.

Q. And calling your attention to Government Exhibit 75, what amounts of omitted interest and what year did you find from that exhibit? This is the mortgage statement of Mr. Eycina.

Q. The Bycina mortgage showed May 6th, '70 payment was not recorded on the tax return of $353 and no cents.

Q. And Exhibits Numbers 78 and 79, 78 being the mortgage or the mortgage for Mr. Mazur, what amounts and for what years of omitted interest did you find?

A. The Mazur mortgage under Government Exhibit Number 78 showed that the 1969 return, - this was merely an arithmetic error on somebody's part, but anyhow, it was understated by $58.75 and in 1970 there was no interest reported at all in the amount of $240.

Q. And what amount of unreported interest did you find from Government Exhibit Number 79?

A. 79 relates to the 1971 tax return and the amount understated or not reported is $20.

Q. Okay, and from Government Exhibit Number 80, the Tokarczyk mortgage statement, what amount of omitted interest do you find in there?

A. The omitted interest on the tax return was the interest payment on April 1, 1970 in the amount of $150.

Q. Okay. What other omitted interest did you find?

A. In 1970 there was the Mazurowski personal loan. In 1970 there were seven payments of $7 each, the interest, that would be $49 was omitted. 1971, five payments from January 1st through May '71 of $7 each, $35 total interest in 1971 not reported from the Mazurowski mortgage.

Q. Okay, and did you get that information from an exhibit?

A. No. This was information on the testimony of Mr. Frank Mazurowski.

Q. Okay, and from Defense Exhibit Number 16, what amount of omitted mortgage did you find from that?

A. Well, 1971 Mr. Gay redeemed a $10,000 Treasury Note which earned 7 per cent interest. This interest amounted to $700 and was redeemed on 3-11-71. It was not reported on the income tax return for 1971.

Q. Okay, and was that amount of interest shown on that exhibit or was that computed by yourself?

A. That was computed by me.

Q. And what was your basis for your computation?

A. Well, it was an interest bearing note and since it was redeemed on 3-11-71 this is when the interest would have been paid at that time of redemption.

Q. Okay, and what rate of interest did you allow on that note?

A. 7 per cent.

Q. And what were the total amounts of omitted interest for the years 1967 through 1971?

A. In 1967 the total omitted interest was $120. 1968 was $120; 1969 was $178.75; 1970 was $4,336.73 and in '71 was $7,395. and no cents.

Q. Calling your attention to the next line on the chart, "Unreported income, dividends", what was your source of information for those amounts?

A. This information is obtained from Government Exhibit Number 144 whichis a schedule that I prepared relative to the unreported dividend income for the year '68 and 1970.

Q. Okay, and what did you use as your source of information for these amounts?

A. My source of information came from Government Exhibit

Number 96 which was brought in, which was introduced by Mr. Fred Meyers of the Morgan Guaranty Trust Company who are the transfer agents for the Niagara Mohawk Power Company.

Q. And for 1968 what amount did you determine to be not reported interest for that year?

A. There were --

THE COURT: You said "Interest". Do you mean "dividends"?

THE WITNESS: Dividends. For the year 1968 there were two amounts, one under the account of Joseph Gay for $440. This comes under Government Exhibit 96-4. There was an amount for Stella Gay for $440 under Government Exhibit 96-9. Total dividends paid by Niagara Mohawk for these two items was $880. Total dividends reported on the tax return by Joseph and Stella Gay for 1968 amounted to $289.50 which is evidenced by Government Exhibit Number 5, the tax return. The total omitted interest, - dividend income from that year was $590.50.

BY MR. MELLENGER:

Q. Okay, and you did give an allowance for the amount reported on the tax return for that year?

A. I don't understand. Oh, yes, I see what you mean. Well, the $289.50 was the amount reported on the tax return, that's correct.

Q. And for the $2,586 figure in 1970, what was your basis for that amount?

A. Government Exhibit 96-6 which was the account of Joseph Gay, dividend of $1,127.50; Government Exhibit 96-11 for Stella Gay which was $1,127.50; Government Exhibit Number 96-13 which is for the account of Joseph and Stella Gay in the amount of $331 and no cents. Total dividends paid were $2,586. Total dividends reported per the tax return, Government Exhibit Number 8 was zero. Total omitted dividend income for 1970 was $2,586 and no cents.

Q. Okay. Calling your attention to the items labeled "Non-tax return items. You showed non-taxable interest in 1971 of $5,487.50. What was your source of that information?

A. My non-taxable interest items were made up from Government Exhibit Number 140 which is a schedule that I prepared and this relates to the non-taxable interest on municipal bonds.

THE COURT: I think we will take a break now since we are getting into another category. It will be about a ten-minute recess and then return at that time and continue with the testimony. You may now walk out with the Marshal. Please leave the sheets right there in your places.

(Jury escorted from the courtroom.)

THE COURT: We will be in recess.

(Recess taken at 11:30 a.m.)

* * * * * *

PROCEEDINGS: After recess, 11:44 a.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury present.)

JOSEPH A. RUSSO, a witness called by and in behalf of the Government, having been previously duly sworn, resumed the witness stand and testified further as follows:

DIRECT EXAMINATION BY MR. MELLENGER (Resumed):

THE COURT: You may continue, Mr. Mellenger.

BY MR. MELLENGER:

Q We were about to start with the portion of your schedule which has the heading, "Non-tax returns items". Calling your attention to the first line under that heading, "Non-taxable interest" you show a source of funds of $5,487.50 for the year 1971. What was your source for that source of funds?

A My source of information came from a schedule I prepared, Government Exhibit Number 140 and this relates to non-taxable interest on municipal bonds.

Q Okay, and what was your source of information on Exhibit 140 which you prepared?

A From Government Exhibit Number 69 which is a statement from the Marine Midland Municipal Company as introduced by Mr. Glenn Roll of Marine Midland relative to Municipal Securities purchased by Joseph Gay and interest coupons thereon.

Q. And that Government's Exhibit 69 also contains the maturity date of the coupons and the amount payable for each coupon, does it not?

A. Yes, it does.

Q. Okay, and for the year 1971 what amounts payable did you record on that schedule from Exhibit Number 69?

A. Government Exhibit 69 shows the, - what I call Item Number 2, there were 5 items on that statement, of which the first one was the taxable. Item Number 2 is a $25,000 Albany County, New York, South Mall 3.75 per cent bond with interest due, purchase date was 10-13-70. The first interest coupon payable was on 4-1-71 in the amount of $468.75. The second coupon payable was 10-1-71 in the amount of $468.75. The third item on that statement was a $25,000 New York City, New York 6 per cent bond with a first coupon payable on 1-1-71 for $750. Second coupon payable July 1, '71 for $750. The fourth item was $25,000 New York City, New York 7.70 per cent bond with a first coupon payable January 1, '71 of $837.50; second coupon payable July 1, '71 of $837.50. The fifth and last item on that statement was a $25,000 New York City, New York 5.50 per cent bond with a first coupon payable on 3-15-71 in the amount of six eighty-seven fifty and a second coupon payable on 9-15-71 in the amount of six eighty-seven fifty.

Q. What is the total amount of non-taxable income interest for 1971?

A. The total amount non-taxable interest on the Municipal Bonds was five thousand four hundred eighty-seven fifty.

Q Calling your attention to the second line there, "Non-tax return items, bank balances, cash on hand, decreases year-end", you show a decrease as a source of funds of $138,211.44. What was your source for that figure?

A. My source for that figure came from Government Exhibit Number 141, again, which is a schedule I prepared relative to the year-end bank balance analysis and for the year 1970 my result showed that the bank balance decreased by $138,211.44.

Q How did you compute that figure?

A. The total year-end bank balances and cash on hand for the year 12-31-70 was $41,178.85 and the prior year balance of 12-31-69 was $179,390.29 showing a reduction, which was the amount for the year 12-31-69, resulting in a net decrease of $138,211.44.

Q Okay. Why do you show that $138,211.44 as a source of funds on your schedule?

A Well, these would be monies available to the, - Mr. Gay in the form of withdrawals or transfers to purchase securities and so forth.

Q So that would be the net decrease in funds in the bank accounts?

A Net decrease, right.

Q Calling your attention to the next line, "Principal payments received on mortgages", what is your source of information for the amount you have entered on those lines for the years '67 through '71?

A This was obtained from Government Exhibit Number 142 which is a schedule that I prepared relative to the principal payments received on mortgages and personal loans for the years '67 through '71, inclusive.

Q Okay, and would you, - what was your source for that information?

A My source of information came from Government Exhibits Numbers 75, 76, 77, 78, 80, 81, 82 and 83. Those were mortgage records relating to mortgage repayments as submitted to Special Agent Krysz of by the defendant, Mr. Gay, and Exhibit Number 83-1 which is a mortgage recap as testified to by Mr. Alphons Wozniak who represented Mrs. Wisniewski on her mortgage.

Q Okay, and what information did you get from Government Exhibit 75, which is the record of the Bycina mortgage?

A. Government Exhibit Number 75, the Bycina mortgage showed there was a principal repayment in the year 1967 of $60; in the year 1968, $346; in the year '69, $586, and in 1970, $548 and in 1971 there was nothing.

Q What information did you get from Government Exhibit Number 76, the Kaczmarek mortgage?

A. The Kaczmarek showed a reduction in principal in 1967 of $7.39; 1968, $150 and no cents; '69, $50 and no cents; 1970, $50 and no cents; and in 1971 zero. Do you want me to read these off?

Q Yes. Would you, the Government Exhibit and the mortgage.

A. Government Exhibit Number 77 was the Kocol, K-o-c-o-l mortgage. 1967 there were no principal payments; 1968 there were no principal payments; 1969 there was $100; 1970, $1,000, no cents; 1971, $1,000, no cents. Government Exhibit Number 78 relates to the Mazur mortgage and in 1967 the principal repayments amounted to $600; 1968 was $600; 1969 was $700; 1970 was $800 and in 1971 it was $4,300 and no cents. Government Exhibit Number 80 relates to the, - I will spell that one, T-o-k-a-r-c-z-y-k mortgage. 1967 showed repayments of $500; '68, zero; 1969, $500; 1970, zero; 1971, $500. Government Exhibit Number 81, - I will spell this one too, T-o-p-o-r-c-z-y-k, and in 1967 the amount was $400; 1968 was $400; 1969, $400; 1970, $400; 1971, $500. Government Number 82 was the Wisniewski mortgage. 1967 and '68 was zero; 1969 was $545.15; 1970 was $730.08; 1971 was $775.50. Government Exhibit Number 83 which is also another Wisniewski mortgage showed a payment in 1967 of $845.76 and zero for all of the year '68, '69. '70 and '71.

Q Okay. Did you pick up any payments on mortgage principal on that schedule?

A. Yes, I did.

Q What was the source of that?

A. This was the Mazurowski mortgage and we picked up the principal, - I picked up the principal payments in 1970 of $700; 1971 of $500. This came from the testimony of Mr. Frank Mazurowski.

Q Okay, and any other amounts picked up on that schedule?

A. In 1968 under the testimony of Special Agent Quinn, where the information was related to him by Mr. Gay on the Wiczlek, that's W-i-c-z-l-e-k mortgage, it was $3,000 and nothing throughout '69, '70 and '71 or '67.

Q What were the total repayments on mortgages received by Mr. Gay in 1967?

A. In 1967 the total mortgage repayments received was $2,413.15; 1968 it was $4,496 and no cents; 1969 was

$2,881.15; 1970 was $4,228.08 and in 1971 was $7,575.50.

Q Okay. Calling your attention to the next line on the chart, "Non-taxable insurance proceeds", what was your source for the source of funds shown in 1970 in the amount of $1,394?

A. The $1,394 came from Government Exhibit's Number 6 which is the income tax return for the year 1970 and Government Exhibit 34-1 which is a cancelled check by Stella Gay. I mean made payable to Stella Gay from the insurance company. What this represents is a, - some kind of an insurance proceed where they file a claim and it was paid to Stella Gay which is a non-taxable source of income.

Q Okay. Calling your attention to the next line on the chart entitled, "Funds from parent" it shows a source of funds in 1969 of $1,427.02. What is your source of information for that source of funds?

A. This came from Government Exhibit's Numbers 39 and 40, Government Exhibit 39 being a bank account and Government Exhibit Number being a deposit slip or deposit slips and this relates to distribution received by Mr. Gay from his father Joseph Gaj relative to 2 brothers who had died earlier as testified by Mr. Leonard Gaj, the brother.

Q Okay, and the next line on the chart, the inheritance in the amount of $1,528.60 shown in 1971 as a source of funds, what is your basis for that entry?

A. Government Exhibit Number 53. Government Exhibit 53 being a check made payable to the order of Joseph Gay drawn on the Buffalo Savings Bank. The remitter was Leonard Gaj. This relates to the estate of Mr. Gay's father Joseph Gaj as testified by Leonard Gaj.

Q. Okay, and your next line "Funds received, redemption of treasury note", you show a source of funds of $10,000 in 1971. What was your basis for that entry?

A. That came from Defense Exhibit Number 16 which is a receipt of the treasury note from the Erie County Savings Bank when Mr. Gay redeemed the note and Erie County Savings Bank gave him a receipt for that note.

Q. And finally the last entry, "Funds received, sale of car", you show show a source of funds in the amount of $200 in 1969. What was your basis for that source of funds?

A. This is based on the testimony of Special Agent Quinn who asked Mr. Gay how much he sold the old car for and he said "About $200".

Q. Okay, and what is your total source of funds to Mr. Gay for the year 1967?

A. For the year 1967 the total source of funds available were $27,500.73.

Q And for '68?

A $21,415.14.

Q Okay, and for '69?

A $32,567.51.

Q For 1970?

A $171,399.07.

Q And 1971?

A $57,715.95.

Q Calling your attention to Government Exhibit Number 159-3 which is another chart which has just been placed on the easel, do you recognize that?

A Yes, I do.

Q What is that?

A That is a chart that was prepared by someone under my direction and it is a schedule wherein I made three calculations.

Q What were those three calculations?

A One was the computed expenditures in excess of funds. Two shows the total taxable income that should have been reported and three the calculation of the additional tax due by Mr. and Mrs. Gay.

Q Calling your attention to the first line, "Total expenditures of funds", what is your source for those figures?

A Total expenditure of funds came from the summary sheet that you had, the chart you had up there earlier, 159-1.

Q Okay, and the total?

A. Yes, that is it, I am sorry.

Q Total sources of funds, what was your basis for that figure?

A. That was Government Exhibit Number 159-2, the second chart you had up.

Q That was the one you just finished testifying about, is that correct?

A. That's correct.

Q How did you compute your expenditures in excess of funds for the year 1967?

A. I computed my excess of funds by taking the total expenditures of funds of forty-three thousand nine ninety-eight fifty-four for the year 1967 and subtracted out the sources of funds of $27,500.73, arriving at an excess of twenty-nine thousand, - $16,497.81.

Q Okay, and how did you compute the expenditures in excess of funds for the year 1968?

A. In 1968 I took the total expenditures of funds in the amount of $39,986.60 less the sources of funds in the total amount of $21,415.14, arriving at an excess of $18,571.46.

Q Okay, and the calendar year 1969, how did you compute the expenditures in excess of funds for that year?

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A. Took the total expenditures of funds from the evidence submitted in testimony in the total amount of $82,855.50 less the sources of funds available in the amount of $32,567.51, arriving at a net excess of fifty thousand, two eighty-seven ninety-nine.

Q. Okay, and for the calendar year 1970?

A. For the year 1970, I took the total expenditure of funds in the amount of $217,560.27 and I applied the sources of funds in the amount of $171,399.07, arriving at a net excess of forty-six thousand one sixty-one twenty.

Q. And for the year 1971?

A. In 1971 the total expenditures amounted to $93,228.32 and the total sources of funds available were $57,715.95 which I subtracted from the expenditures, arriving at a net excess of $35,512.37.

Q. And the next line you have titled "Taxable income reported", what was your sources for the entries on that line?

A. My sources were the Government Exhibits 4,5,6,7 and 8 which are the income tax returns filed by Joseph and Stella Gay for the years 1967 through 1971, inclusive.

Q. Okay, and how did you compute the total taxable income for 1967?

A. I took the total taxable income as reported by the defendant on the returns of $13,218.62 for 1967 and added that to the excess of expenditures of sixteen thousand four ninety-seven eighty-one, arriving at a total taxable income of twenty-nine thousand seven sixteen forty-three.

Q. And for the year 1968?

A. For the year 1968 I took the total expenditures in excess of funds of eighteen thousand five seventy-one forty-six, added it to the taxable income reported per the tax returns, twelve thousand one sixty-seven ninety-eight, arriving at a total taxable income of thirty thousand seven thirty-nine forty-four.

Q. And for 1969?

A. 1969 the excess of funds amounted to fifty thousand two eighty-seven ninety-nine to which I added the taxable income as reported on the 1969 tax return of sixteen thousand four thirty-three ninety-three, arriving at a total taxable income of sixty-three thousand seven twenty-one ninety-two.

Q. And for 1970?

A. 1970 the expenditures in excess of funds amounted to forty-six thousand one sixty-one twenty to which I added the taxable income as reported per the 1970 tax return of sixteen thousand five thirty-seven forty-six, arriving at a total taxable income of sixty-two thousand six ninety-eight sixty-six.

Q And finally, 1971?

A 1971 the expenditures in excess of funds amounted to $35,512.37 to which I added the taxable income as reported per the 1971 return of $19,282.58, arriving at a total taxable income of $54,794.95.

Q And finally, you also computed the additional tax due on this schedule, is that correct?

A Yes, I did.

Q Calling your attention to line entitled "Total tax due" what is your basis for the entry on that line?

A Total tax due is a result of the recalculated tax based on the total taxable income on the above line. For 1970 would be the tax based on the taxable income of twenty-nine thousand seven sixteen forty-three.

Q For 1970 or 1967?

A 1967, I am sorry.

Q And the "Tax reported" line, what was the basis of information on that?

A The tax reported line represents the amount of tax reported on the tax return for 1967 of $2,564.66, resulting in an additional tax due for 1967 of $5,204.75.

Q For 1968?

A 1968, the total tax due was based on the taxable income, total taxable income above of thirty thousand seven thirty-nine forty-four and I subtracted out the reported tax paid on the 1968 return of $2,474.65, arriving at an additional tax due of $6,306.36.

Q For 1969?

A. 1969, the total tax due was based on the total taxable income as shown above of sixty-three thousand seven twenty-one ninety-two and as less the tax reported per return of $2,880.33, arriving at an additional tax due of $23,750.26.

Q And for 1970?

A. 1970 I computed the tax based on the total taxable income for 1970 of $62,698.66, arriving at a total tax due of twenty-four thousand three 0 eight thirty less the tax reported per the tax return of three thousand four ninety-five seventy-five, arriving at a net additional tax due of $20,812.55.

Q And for 1971?

A. In 1971 I computed the tax based on total taxable income of $54,794.95, which amount is, - which resulted in total tax due of $19,541.32, wherein I deducted the tax reported on the tax return of $4,179.12, arriving at an additional net tax due of $15,352.20.

Q So your line "Total tax due" would be the tax shown on the line "Total taxable income", is that correct?

A. That's correct.

Q And the tax reported would be the tax computed on the line "Taxable income reported", is that correct?

A. That's correct.

Q And finally your computation of additional tax due would be the tax computed on the expenditures in excess of funds, is that also correct?

A. That's correct.

Q Mr. Russo, did you make any determination based on the evidence which was submitted and your review of the evidence as to the stocks held by the defendant on December 31, 1966?

A. I considered, - yes, I did. I considered the stocks in his portfolio as of 12-31-66.

Q And how did you determine what stocks were held in his portfolio as of 12-31-66?

A. Well, I went to the 1966 income tax return which shows dividends he was receiving from other corporations and companies.

Q And did you make a determination as to whether any of those stocks were sold in the years 1967 through 1971?

A. Some were sold and as reported on Schedule D of the respective years of the sale, yes.

Q Okay, and did you make a determination that some of the stocks were not sold?

A. Yes, I did.

Q And how did you make that determination?

A. By tracing them through on the subsequent year returns, '67, '68, '69, '70 and '71 wherein Joseph and Stella Gay still reported dividend income from the same holdings that they had back in 1966.

Q Okay, and did you make a determination as to mortgage loans on December 31, 1966?

A. Yes, I did.

Q And how did you make that determination?

A. By the same method of applying the interest reported under mortgages. In 1966 the people he gave mortgages to and comparing those with the subsequent years returns to see if they still appeared on the interest portion of the return.

Q Okay, and were some of those paid back during the indictment years?

A. Yes, some were repaid.

Q Okay. Did you make any comparison with the mortgage records submitted by Mr. Gay as to these mortgage repayments?

A. Yes. These were all compared with the mortgage statements submitted by Mr. Gay.

Q And did you make a determination as to whether any mortgage loans were repaid which weren't shown in Mr. Gay's mortgage statements?

A. I found none.

MR. MELLENGER: Okay. I have no further questions, your Honor.

THE COURT: Mr. Murphy, it would appear to me, that you might want to ask some preliminary questions and then because there is such a bulk of material here we might then, after ten or fifteen minutes, break and come back after a recess at 1:30.

CROSS EXAMINATION BY MR. MURPHY:

Q Fine, your Honor. Sir, did you, many of the computations which you made were based on the testimony of the Special Agents, isn't that correct?

A. Wherever a Special Agent testimony was introduced, yes.

Q All right, and that would have been, - incidentally, did you review the Special Agent's reports in this particular matter of the interviews?

A. I made a cursory review of them, yes.

Q But you did utilize them?

A. I did not utilize them.

Q I mean you did review.

A. I did review but I did not utilize them.

Q You saw the one Special Agent testify by reading off his report which was in front of him, isn't that correct?

A. Yes.

Q. And what agent was that?

A. It was either Special Agent, - I think they both did.

Q. Well then, Quinn and who was the other Agent?

A. Krysztof.

Q. And Krysztof. They both read off their reports?

A. Yes.

Q. With regard to interviews with the defendant in this case, isn't that right?

A. Yes.

Q. All right. Now, their testimony, of course, was based on one particular interview that occurred in a bar room, do you recall that, sir?

A. Yes, I do.

Q. All right, and you utilized that figure, did you not, throughout this entire summary of expenditures and sources of funds?

A. What figure was that, Mr. Murphy?

Q. Well, you tell me what figure you used for cash on hand?

A. Oh, the cash on hand figure?

Q. Yes.

A. The $2,000 figure?

Q. Yes.

A. Okay.

Q Did you give Mr. Gay credit for that?

A. I sure did.

Q For what year?

A. All the years.

Q Each year?

A. Yes.

Q He got a credit of $2,000?

A. That's correct.

Q All right. Well, did not Agent Krysztof testify that at a meeting with Mr. Gay on December 28, 1971, - -

A. If that's the date, yes.

Q All right, and he testified, did he not, that he asked Mr. Gay about cash on hand at that time, isn't that true?

A. That's true.

Q Now, if this is that he ever had, isn't that right?

A. Right.

Q And wasn't his reply that would depend upon any combination of savings account withdrawals, mortgage payment receipts, proceeds of stock transactions, stock dividends received, non-income items previously mentioned and receipts from Gay's Printing and that he said that it would be impossible for him to recall any combination of the above sighted factors?

A. Who said that?

Q Mr. Gay.

A I don't recall the testimony to that extent. I mean all I can recall is Mr. Krysztof saying that he asked Mr. Gay about cash or hand or cash at any one time. Is this what we are talking about?

Q Yes.

A Yes.

Q This is the $2,000 figure that we are talking about?

A Okay.

Q Because according to your summary, sir, you are talking about an excess of funds in amount of about $167,000, isn't that true?

A That is correct.

Q All right. Now, you say anything over and above $2,000 for the five years in question or $10,000 credit which you say you allowed to Mr. Gay, would reduce that figure if it were an input as a result of savings over the years, isn't that true?

A It would be a credit, yes.

Q Well, in utilizing the $2,000 figure do you recall that in an interview with Mr. Gay on January 6, 1972 that Agent Krysztof indicated that he gave him mortgages in the amount of Wisniewski, seven thousand; Mazurowski, six thousand; Toporczyk, six thousand; Bycina, ten thousand; Kaczmarek, six thousand; Toporczyk, three thousand five hundred; Nancy Kocol, five thousand; Mazur, nine thousand and two thousand?

A. Yes.

Q. Over the years?

A. Yes.

THE COURT: There are so many figures here, Mr. Russo, if you want to check any sheets or check any figures you can do that.

THE WITNESS: Well, they sound reasonably correct from the past records, evidence that I reviewed.

BY MR. MURPHY:

Q. All right. You do, - so that we have it straight, sir, you do indicate that you do made a perusal of the memorandums of interviews made by the Special Agents with the defendant, Mr. Gay, isn't that right?

A. Yes, I did.

Q. All right. Now, I believe the United States Attorney has the original. Now I show you what has been marked Court Exhibit 3 in which you indicated you recall Agent Krysztof having this before him when he testified with regard to an interview with Mr. Gay on December 28th 1971; do you recall that?

A. Yes.

Q All right. Now again, sir, going back to refresh your recollection did he not testify to cash on hand and Mr. Gay indicated to him that there were numerous areas where he would receive cash on hand and could not in any way at any time give an exact amount with regard to it; do you recall that testimony?

A. No, I don't. I don't recall it in such words.

Q Well, did he testify, sir, that when he asked the taxpayer how much cash on hand he ever had he replied that he did not know, he said it would depend on any combination of saving account withdrawals, mortgage payments received, proceeds of stock tranactions, stock dividends received, non-income items previously mentioned and receipts from Gay's Printing; you do not recall that testimony?

A No, I don't, not under cash on hand. Where are you reading from?

Q Right there.

THE COURT: This is report, Mr. Murphy, of Mr. Krysztof's and it is your recollection that Mr. Krysztof, in his testimony, did testify to these things?

MR. MURPHY: Yes.

THE COURT: Because I think we would all agree perhaps there are some things in his report that he did not testify to.

MR. MURPHY: Right. Yes, your Honor.

THE WITNESS: Okay. I see the way it is worded here. He did say that.

BY MR. MURPHY:

Q Right.

A But he is making reference here to - -

Q All right, please. Just that he did say that. Now, did you take that into consideration in making your report?

A Of course I did.

Q Okay, but only to the extent of $2,000 for each year?

A That statement does not say anything about dollar amounts. All he talks about is cumulatives - -

Q Please.

A Or any estimated amounts. I want the actual figures.

Q All right. You took the interview in the back of a bar room, isn't that right?

A I didn't take anybody's interview anyplace.

Q Sir, you utilized, did you not, and you testified on at least three occasions already that you utilized a $2,000 figure cash on hand?

A That is correct.

Q And you utilized it for every year?

A That wasn't in the back of the bar room. Krysztof didn't interview him in the bar room.

Q Didn't Krysztof - -

A. No.

Q Please, sir.

A. Not according to my notes.

Q Well, all right. We can get the testimony checked.

A. He met Mr. Gay in the bar room and went back to his house and then asked about the cash on hand at his home and my notes say here - -

MR. MURPHY: Please.

MR. MELLENGER: Your Honor, I am going to object to this. I think cross examination should be limited to the calculations which Mr. Russo prepared, not his recollection.

THE COURT: That is what Mr. Murphy is doing. He is asking about the underlying testimony or documents to determine whether or not Mr. Russo used these documents or testimony in his calculations. Mr. Murphy, however, in this kind of an inquiry, it is important that we do not, - you know, make sure we do not take anything out of context, so I am going to permit Mr. Russo to make a complete answer and then you can then of course question further about the problem.

MR. MURPHY: All right.

THE COURT: So we can pin it down so that we have an understanding of what this is about.

BY MR. MURPHY:

Q All right, sir. Can you tell me, - you again have indicated, - let's get to the $2,000 cash on hand figure, is that right?

A That's correct.

Q Now, you indicate that that figure came from the testimony of Agent Krysztof, isn't that true?

A That's correct.

Q All right, at an interview with the defendant?

A That's correct.

Q Isn't that right?

A That's correct.

Q You know when that interview took place?

A I think, if I got the right date here, - there are so many dates here, 6-8-72.

Q June 8th of '72?

A Okay.

THE COURT: Mr. Russo, again I say we are not in any hurry. If you want to check dates you go ahead.

THE WITNESS: Your Honor, I can only check dates from what I was able to write down.

THE COURT: You go ahead and look at your notes and make that determination.

BY MR. MURPHY:

Q Now, wasn't that, sir, at the time that Mr. Krysztof indicated to the defendant, that Agent Brownell was going to take over the case and he introduced him to Brownell at the, - in the Park Lounge on Clinton Street in the City of Buffalo?

A. That's correct.

Q All right, and wasn't it Mr. Krysztof's testimony that they went to the back room of the bar at which time he asked him about cash on hand and that is where the $2,000 figure came from?

A. It may have been. I don't have a note as to whether it was in the back room of the Park Lounge or whether it was at Mr. Gay's home.

Q All right.

A. But I do recall that Mr. Krysztof went back to Mr. Gay's house and asked him various questions.

Q Well, the first time they met, sir, I want to, - just to jog your memory a little, isn't it true that the first time that Mr. Krysztof met Mr. Gay, Mr. Gay was in the Park Lounge, the very first time?

A. That's correct.

Q. And then they went back to his home, isn't that true?

A. That's correct.

Q. On that occasion?

A. That's correct.

Q. All right. Now, do you recall, sir, the testimony of Mr. Quinn with regard to his interviewing the defendant, Mr. Gay on February 21, 1973 in the Intelligence Division of the Federal Building or 111 West Huron Street?

A. Yes, I recall that. I don't know whether the date, - what the exact date was.

Q. But it was a rather extensive interview, was it not, concerning where Mr. Gay's, - the monies, the $10,000 figure on that particular note came out on that date, the Federal Note; do you recall that testimony, sir?

A. Well, there was several things discussed. Let's see.

Q. All right.

A. There may have been. I don't have anything down here about the $10,000 note.

Q. All right. In any event, do you recall Mr. Quinn asking Mr. Gay or testifiying that Mr. Gay told him with regard to issuing the proceeds of mortgages, example being the Kocol mortgage in 1969 for five thousand and the Mazurowski mortgage for six thousand in 1971 and that Mr. Gay said or Mr. Quinn, rather, said he asked him specifically how he issued the proceeds for this mortgage to which Mr. Gay told him that he couldn't recall specifically how many of the mortgages were issued but it could have possibly been in cash if he had money available and it could have possibly been a bank draft. Do you recall that, sir?

A. Yes.

MR. MELLENGER: Your Honor, I am going to object. I think Mr. Murphy is trying to cross examine the testimony of Mr. Quinn through Mr. Russo here. I think his questioning should be limited to compellation of schedules and where sources came from for the various figures and what he took into account.

THE COURT: I think that is what he is doing. Mr. Murphy, if you use any reports you have to be careful because we know that Mr. Russo did not prepare the reports of Mr. Quinn or Mr. Krysztof or other Agents. Furthermore, certainly you have the responsibility when you call Mr. Russo's attention to prior testimony in the case to do it as accurately as possible. I will let you cross examine as to that but it is up to you, of course, ladies and gentlemen, to determine whether or not Mr. Murphy in cross examining by using the prior testimony as accurately recalled it, whether or not in his question, he has put together all of the testimony and Exhibits which ought to be put to the witness so the witness can make a considered judgment in answering the question and that is why I am letting Mr. Russo answer the question fully because he may say "Yes, I remember that testimony and on the other hand there is additional testimony or Exhibits which led me to a certain conclusion".

Let us do this at present; we will now be in recess until 1:00 o'clock. You will certainly over the noon recess, not discuss the case or talk about it. Leave your sheets there in front of you. You may go out with the Marshal. I am sorry. I wondered why everyone looked puzzled, 2:00 o'clock. Mr. Murphy and Mr. Mellenger, I would think, - why don't you gather together, Mr. Murphy, any Exhibits or any other information which you think the Government has, so that you will have them all available to you when we return and continue the questioning at 2:00 o'clock.

MR. MELLENGER: Fine, your Honor.

THE COURT: We will be in recess.

(Recess taken at 12:35 p.m.)

* * * * * * * * * * *

PROCEEDINGS: April 6, 1976, 2:05 p.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury present.)

JOSEPH A. RUSSO, a witness called by and in behalf of the Government, having been previously duly sworn, resumed the witness stand and testified further as follows:

CROSS EXAMINATION BY MR. MURPHY (Resumed):

Q Now, sir, I believe we were discussing your utilization of the testimony of Agent Quinn, with regard to the mortgages, is that correct?

A Yes.

Q All right. Now, in 1971, and I show you Government Exhibit Number 106 in evidence, there is a mortgage to Frank Mazurowski and Elenore Mazurowski, his wife, from Stella Gay in the amount of $6,000, is that correct?

A That's correct.

Q Now, did you determine whether or not from the various bank accounts that were examined and are now in evidence in the year 1961 whether there is a withdrawal on or about the date of that mortgage?

A No, I personally did not, no.

Q All right, so that if that were made from cash itself, it would be some indication that Mr. Gay at times kept on hand cash more than $2,000, isn't that true?

A. If this were made from cash on hand it would be a reduction of cash on hand.

Q All right. Well, as I understand it from your speaking of cash on hand, you utilized in each of the years $2,000, isn't that your answer?

A. That's correct.

Q All right, so if a $6,000 loan were made then the $2,000 figure would not be a correct figure, isn't that true?

A. That is not so.

Q All right.

A. When I speak of cash on hand I am speaking of cash on hand at year end, not during the course of the year.

Q Cash on hand at year end?

A. That's correct.

Q So that when you take into consideration this $2,000 figures, it would be your statement or your belief that if Mr. Gay said to the Agent that he only keeps $2,000 on hand, that that would be as of December 1st, I am sorry, December 31st in each of the years in question, is that right?

A. That's correct.

Q All right, so what went on during the year or anything like that, you don't take that into consideration?

A. Well, you do indirectly but not per se, because you are not tying down the exact item. You are working with year end balances.

Q. So you work with year end balances. In other words, when you boil the whole thing down with respect to your summary we have, do we not, $167,000 and one hundred sixty-seven some odd dollars that you say is attributable to other income, right?

A. That's right, based on the information submitted into evidence, that's correct.

Q. From the years in question?

A. Right.

Q. All right. Now, you heard, did you not, a Government witness, namely the defendant's brother testify with regard to a $15,000 loan?

A. Yes, I did.

Q. In cash?

A. Yes, I did.

Q. That was secured from a box which contained more cash?

A. Yes, I did.

Q. Did you give any credence to that at all?

A. No, I did not.

Q. So in other words, you didn't personally say, "Well, the man, that never happened"? What you are saying is you didn't utilize that in your report, is that right?

A. That's correct.

Q. All right. You are not passing or you did not pass on the credibility of that statement?

A. No. I only said I did not use it in calculating my figures.

Q. All right. Now, of course, prior to coming in here and when you learned that you were to be an expert and the chart maker in this case, did you investigate into the entire case?

A. When you say "investigate" I don't quite understand what you mean.

Q. Well, the case began in 1971, isn't that true?

A. That's correct.

Q. With an interview of the defendant?

A. That's correct.

Q. After which there were certain moves made by the tax people, isn't that true?

A. That's correct.

Q. There were civil aspects to this case, are there not?

THE COURT: Mr. Murphy, as we know, Mr. Russo's function is to listen to the evidence in Court and look at the Exhibits here. It is not his function to look at documents outside of Court which are not here and certainly whatever happens in a civil case has nothing to do with our function in this case.

MR. MURPHY: I understand that, your Honor. I just wanted to know if he has familiarized himself with these particular documents and the calculations that were made with respect to them.

THE COURT: All right.

BY MR. MURPHY:

Q Now, did you, in preparing, prior to coming into the case and sitting down in the courtroom, did you familiarize yourself with those aspects of this lawsuit?

A. Only to the records that were submitted as evidence.

Q Now, these records were prior to them being introduced into evidence?

A. I am not sure I understand the question.

Q What I am trying to get at is, in preparation for your coming into the case before we ever got to the courtroom -

A. Yes.

Q There was a time when you knew you were going to be assigned as the expert and make a chart with regard to the evidence, isn't that true?

A. That's correct.

Q All right. Now, when you learned of that, did you make a study into the steps that had been taken with regard to this case up until then?

A Well, I only reviewed what was available in the form of evidence, that's right.

Q At that time it wouldn't have been evidence if we were not in the courtroom?

A I don't understand the legal procedure as to whether it is accepted or not.

Q I am saying prior to coming into the courtroom, did you sit down with Agent Quinn and go over various records with him?

A I went over certain records, yes.

Q With Agent Quinn?

A Well, not necessarily Agent Quinn.

Q Well, with who did you go over them with?

A Well, Mr. Krysztof and Mr. Quinn.

Q Mr. Quinn and Mr. Krysztof, is that right?

A Right.

Q Did you go over a record with Mr. Quinn wherein he compiled a similar summary to yours?

A Not per se.

Q When you say "not per se" what do you mean by that?

A Well, when you say a similar summary you are speaking of the summary utilized in the indictment, am I correct?

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Q Well, did you utilize the summary that was used for the indictment?

A I used the format.

Q You used the format but you did use the summary?

A As I understand it, you have to.

Q All right, you did?

A Yes, I did.

Q You understood that you had to?

A That's correct.

MR. MURPHY: Your Honor, may I utilize Exhibit Numbers 20 and 21 on behalf of the defendant?

THE COURT: Certainly.

(Defendant's Exhibits Numbered 20 and 21, marked for identification.)

THE COURT: These are Government Exhibits?

MR. MURPHY: No, Defendant's.

THE COURT: Your Exhibits?

MR. MURPHY: Yes, as I see the list.

THE COURT: All right.

BY MR. MURPHY:

Q I show you Defendant's Exhibit 21, sir, and ask you if this is the summary prepared by Mr. Quinn which you went over with regard to this particular indictment?

A. I don't know who prepared it, but some of the schedules I have never seen before. I basically worked off the final schedule which was, - I saw you with something up there in your hand which resembled a typewritten schedule.

Q. You never saw Exhibit 21 before?

A. Not as such, no.

Q. All right. I show you Defendant's Exhibit 20 for identification and ask you if you worked off that, sir?

A. Yes, I did.

Q. Now, this is the format which you utilized, is that correct?

A. That's true.

Q. All right. Did you have opportunity to compare that with your particular Exhibit, sir?

A. Oh, yes.

Q. All right. Now - -

A. It is probably the other way around.

Q. With regard to the expenditures of funds in your comparison, do you show some sixty-three thousand, sixty-four thousand dollars difference?

A. Where is that?

Q. Well - -

A In the total?

Q Yes, total.

MR. MELLENGER: Your Honor, I am going to object to anything being read off Defendant's 21 which is not in evidence.

MR. MURPHY: Then I will offer it in evidence, your Honor.

MR. MELLENGER: I object to it being admitted in evidence, your Honor.

THE COURT: You object. Can you step over here a minute, please?

(Sidebar conference held between Court and Counsel as follows:

THE COURT: We are concerned with Exhibit 20, Mr. Murphy. Can you tell me how was this prepared and so forth?

MR. MURPHY: If I understand it, this was handed to me, your Honor, by Mr. Mellenger. He indicated Mr. Quinn had prepared this and was a summary of their records in the case.

THE COURT: Where does this come from?

MR. MELLENGER: That comes from Mr. Quinn but a lot of things on this are not in evidence and there are changes.

THE COURT: Quinn prepared this during the course of his investigation?

MR. MELLENGER: Right, and there are numerous changes in there.

THE COURT: I will sustain the objection.

MR. MURPHY: Your Honor, may I be heard one moment? As I understand it, your Honor, the Government in response to defendant's motions - -

THE COURT: Yes.

MR. MURPHY: Submitted a summary which would be 21 which I was showing him.

THE COURT: I see.

MR. MURPHY: This is what they contend the case was all about. Now, maybe I am wrong. I understand this to be different.

THE COURT: You mean this is the sheet attached to the answer to the Bill of Particulars?

MR. MURPHY: Yes.

THE COURT: Well, as we know, Mr. Murphy, the responses to Bill of Particulars are informational. The Government is not put into a vice so that that is the only answer to be received. If some evidence is not available, witnesses die, exhibits are lost, certainly there would be a change. Furthermore if between the time of getting the bill and the time trial comes on, additional evidence should come to their attention, they can put it in. Mr. Russo had nothing to do with the preparation of Exhibit 20.

MR. MURPHY: Not the preparation.

THE COURT: And he did not use it in his calculations.

MR. MURPHY: As to that, no your Honor, but he did indicate he felt he was obligated to examine it.

THE COURT: I think his testimony is he is obligated to follow the same theory Mr. Quinn and the other Agents used in their basic consideration of the evidence and the Exhibits in the case so I will sustain the objection.

MR. MURPHY: All right.

(Sidebar conference concluded.)

BY MR. MURPHY:

Q Now, Mr. Russo, in the preparation of your report, you utilized a '66 return, isn't that true, 1966?

A Not in the preparation of my report. I reviewed the '66 return for the dividends and the interest relative to stock holdings and mortgage holdings and also for the payment of the tax, the '66 tax on the '67 return. I mean the '67 year.

Q I ask you, sir, again just did you attribute when you started off in 1967, you did attribute some cash savings to Mr. Gay, is that right?

A The cash savings that were given in testimony, yes, the $13,000.

Q Thirteen?

A Thirteen thousand.

Q All right, $2,000 which you attributed to Mr. Gay?

A The so-called cash on hand and the eleven thousand that was in the mattress.

Q What, sir, is your definition of "cash on hand"?

A "Cash on hand" is exactly what the word means. It is what cash is available at any time.

Q Well, I thought that we were using the last of the year?

A I say at a given time. Since we are using year end balances, I am speaking of 12-31.

MR. MURPHY: All right.

THE COURT: Mr. Russo, when you say "cash on hand" does that mean what you have in your hand?

THE WITNESS: No. It is an accounting term. Cash on hand, it would be almost the same as petty cash on the balance sheet of a corporation. Cash on hand is the cash that is readily available at the year end if we are using a year end period. If we are using year end period, if we are using year end period, but if we are using a fiscal period it is cash on hand at that particular period.

THE COURT: Does that mean money that an individual may have in places other than his person?

THE WITNESS: Oh, yes.

THE COURT: Could you describe that?

THE WITNESS: It could be cash in a drawer, cash in his pocket, cash in a shoe box; it could be cash anyplace.

THE COURT: What if he had a check in his pocket made payable to him?

THE WITNESS: A check made payable to him is not really cash. I suppose it could be. I am not too sure I understand what you mean when you say "check".

THE COURT: Someone, - my mother-in-law gives me a check, it is my birthday, for $25 and I put it in my pocket and I do not cash it. Now, is that cash on hand?

THE WITNESS: Not really.

THE COURT: All right. Go ahead, Mr. Murphy.

BY MR. MURPHY:

Q I am sorry, your Honor. So then when you speak of cash on hand and when an Internal Revenue Agent speaks of cash on hand he is speaking of an accounting term, is that right?

A. Yes, I would say it is an accounting term basically.

Q All right, and which the, - would the taxpayer ordinarily know that this means year end balance, cash anyplace?

A. I don't know. I didn't ask the taxpayer that question.

Q I see, so that if Mr. Gay, during the course of a year were to utilize cash savings to give a $6,000 mortgage as long as that didn't happen on December 31st you wouldn't call that cash on hand, is that right?

A. If I understand your question correctly if he goes through $6,000 in cash during the course of the year?

Q Yes.

A. That cash was not on hand at the beginning of the year which would be the end of the prior year, no, that is not cash on hand.

Q. All right, so then your entire report, as I understand it, with the summary of this $167,000 in excess disbursements over income is based on the proposition that as of January 1, 1967 and December 31, 1966, Mr. Gay had cash of $2,000, is that right?

A. Thirteen thousand.

Q. Well, Mr. Gay?

A. Okay, two thousand.

Q. Two thousand. Okay. Now then we go to Mrs. Gay and you picked up that it was in the mattress, is that right?

A. This is what was told to the Special Agent.

Q. All right. Now then, did you utilize, sir, the testimony with regard to the Social Security in any way?

A. The Social Security? I don't understand the question.

Q. Well, did you hear any testimony in the courtroom on behalf of the Government witness with regard to Social Security?

A. Well, that was the stipulation, - wasn't that, - do you mean Mr. Quinn?

Q. Yes. There were no stipulations.

A. Yes, Mr. Quinn's relative to Social Security earnings of Mr. Gay?

Q Yes.

A. Yes sir, I remember.

Q What are Social Security earnings?

A. Wages.

Q Well, wages to what extent?

A. To the taxability of Social Security.

Q Which is how much?

A. Well, back in those years it could have been $3,600, $3,000 or $3,600, I don't remember which.

Q All right, so that from '45 when you spoke of wages all Social Security could tell you was that if you made the $3,600 that that year you made at least $3,600, isn't that true?

A. For Social Security purposes this was all you were subject to Social Security taxes.

Q Taxes?

A. That's correct.

Q So that from '45 to '69 if there were sixty some thousand dollars we would have to know, would we not, what the Social Security limits were on wages in imposing this tax, isn't that true?

A. If you want to arrive at some kind of an income figure over and above the Social Security wages, yes, you would have to know that.

Q All right, so as far as you are concerned, that particular testimony or the complete testimony of wages earned from '45 through the taxable years is not here in the courtroom in evidence, is it?

A. I think he read that off his memorandum.

Q. I know it came from his memorandum and he said he had contacted the Social Security people, he didn't know what year Mr. Gay started or what, isn't that right; do you recall that testimony?

A. Yes, I remember because he wasn't too sure.

Q. He wasn't certain.

A. He went back to something like 1945 or '43.

Q. I see, but all they would have reported to him was like say '45, the year '45, let us take that as an example, all they could say if he made more than $3,600 was that he made thirty-six hundred, isn't that true?

A. That's correct.

Q. And it is fair to say, is it not, that you in no way utilized that in the preparation of your - -

A. Utilized what, the Social Security statement?

Q. Yes, the Social Security statement.

A. No, the - -

Q. No, the particular statement from Mr. Quinn. I know you utilized Social Security when you went over the tax forms, naturally, didn't you?

A. Right.

Q But I am referring now only to the statement of Mr. Quinn.

A I don't see how that fits into wh[illegible]re trying to ask me.

Q What I am trying to ask you, sir, is in your report does it, anywhere, reflect Mr. Quinn's statement that there was some sixty-nine thousand odd dollars earned between '45 and the end of 1971?

A That is prior earnings to 1967 if I remember correctly.

Q Right.

A Earnings and whatever, so when you say taken into account, this would have to be monies back to 1943. You are talking twenty, twenty-three years.

Q You didn't - -

A Prior.

Q All right, go ahead.

A How can I take that into account?

Q That is all I want you to testify to. If you did not do it then say you didn't do it.

A They are prior earnings. I don't understand how you take them into account. They are either spent in the form of investments or cost of living.

Q Or saved?

A Or saved, which would show up in the bank accounts.

Q Pardon?

A Which would show up in the savings accounts.

Q Well, are there any accounts that go back to 1943?

A This I don't know.

Q All right. Did you utilize any of the accounts prior to the year of '66?

A I used the bank balances as of 12-31-66.

Q All right. There was in evidence in this case, was there not, at the time that you made out your report, all of the bank books submitted into evidence, is that right?

A That's correct.

Q All right. You didn't utilize these at all?

A No, I did not. I worked from the bank statements as submitted by the various banks.

Q And they began as of when?

A I don't recall but they go beyond, they go prior to 1966.

Q The books go prior or the bank statements go prior?

A I think the bank statements go back. I would have to look at the statements to be sure but I didn't concern myself too much with prior.

Q Do you have the bank statements?

A Buffalo Savings.

MR. MELLENGER: Here is Marine, here is Erie Federal and Buffalo Savings.

BY MR. MURPHY:

Q I am showing you Government's Exhibit, for the record - -

A Just grab any one.

Q Well, do you want to look? These are what purport to be the Exhibits covering the Buffalo Savings Bank. Now, is there any date there prior to - -

A No, there is not.

Q 12-27-66?

A No. That is the year end balance.

Q All right. Showing you Marine Trust, does that start 7-28-66?

A I think so. This is the checking account, isn't it? That appears to be the first entry.

Q Erie Federal, Exhibit 60 in evidence, October 8, '70.

A This one, yes, this account was opened in '70.

Q Erie Federal again, Exhibit 58 in evidence, 12-30-66?

A That is the starting balance as of 12-30-66.

Q So that the bank statements that you utilized, of course, sir, were all from the ending balance of '66 through the end of '71, isn't that true?

A That is correct.

Q So you can't then state from anything that is in evidence in this case that all of the savings Mr. Gay would have had were in the bank prior to the year 1966?

A No, I can not.

MR. MURPHY: All right. That is all I have, your Honor.

THE COURT: Mr. Mellenger.

BY MR. MURPHY:

Q I am sorry, one more question. Are you familiar, sir, with the means by which, through your experience the means by which a bank draft is purchased at the Buffalo Savings Bank?

A Well, I presume they are pretty much the same at every bank but I am not too sure whether Buffalo Savings is peculiar or different than any other bank.

Q Well, we know from the evidence, do we not, that Mr. Gay did not have a checking account with Buffalo Savings?

A That's right.

Q Is that true?

A Right.

Q They don't have checking, savings accounts?

A That's right.

Q And when individuals say that they were given or the stock broker says it was paid by check from Buffalo Savings, that would be a bank check, isn't that right?

A That would be a bank draft.

Q A bank draft?

A That's right.

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Q Now, that has to be purchased, does it not, sir, by either a withdrawal from a savings account or via check on some other bank or by cash?

A. That is correct.

Q All right. That is the three methods of obtaining it, would that be fair?

A. To the best of my knowledge, yes, those are the only three ways you can do it.

MR. MURPHY: All right. Thank you, sir.

REDIRECT EXAMINATION BY MR. MELLENGER:

Q Mr. Russo, during Mr. Murphy's cross examination, he asked you whether you had given any credit to the $100,000 kept in the strong box which Mr. Leonard Gay testified about and you said you had not. Why didn't you give any credit in your calculations to that $100,000?

A. Well, in the first place it wasn't established or substantiated that as of 12-31-66 that Mr. Gay had this $100,000 on hand, and in the second place it was only an estimate and that goes back to 1956. There was no record of any cash nor any mention made to the Special Agents about this.

MR. MELLENGER: I have no further questions.

RECROSS EXAMINATION BY MR. MURPHY:

Q Well now, testimony with regard to the Special Agents or testimony of the Special Agents, you said there was no testimony to the Special Agents.

A Well, I don't know if you use a play on words, but what I am referring to is that from the testimony given by the Special Agents both stated what they had in cash, - what Mr. Gay had in cash on hand. Mr. Krysztof the $2,000 and Mr. Quinn the $11,000.

Q Well, isn't it true, sir, and when you heard the testimony with regard to Mr. Quinn that the question put to Mr. Gay was not how much did Mrs. Gay have on hand; wasn't the question, "Where did you get the money to buy the Federal Note", isn't that the question that was asked of him?

A I don't recall.

Q Well, didn't you testify that in your chart you took into account that $10,000 Federal Note, didn't you?

A Yes.

Q And you recall that Mr. Quinn did testify that his examination of all the Federal records he couldn't find that there was such a note, isn't that right?

A Yes, you are right.

Q All right, and then he was shown a receipt from the Erie County Savings Bank that showed that a special account where savings certificate was purchased by proceeds or by a Federal Note, isn't that right?

A. That's right.

Q. So you utilized the Defendant's Exhibit to that extent, did you not?

A. Just that that was used to establish how they opened that certificate of deposit.

Q. All right. Now, isn't it a fact that Mr. Quinn was inquiring of Mr. Gay and did testify that the inquiry with regard to the $10,000 was how he purchased the Federal Note, if you recall. If you don't recall - -

A. I don't actually recall how he asked or what his purpose in asking.

Q. All right, and again the $2,000 figure was a statement of cash on hand and you think it may have been in his home as opposed to a bar room, isn't that right?

A. Well, I don't really recall where it was made but it was made by - -

Q. Mr. Gay?

A. Mr. Gay to Mr. Krysztof.

Q. All right, and you don't recall the testimony of Mr. Gay or Krysztof testifying that Mr. Gay, at no time, could determine because he would have to take into account all of his bank balances and dividends and et cetera as to cash on hand?

A. Only in the memorandum that you showed me.

Q. All right, but you do recall Mr. Krysztof testifying from the stand from those memorandums?

A. Yes, I recall him testifying.

MR. MURPHY: That is all.

MR. MELLENGER: Nothing further of this witness, your Honor.

THE COURT: Nothing further. Thank you, Mr. Russo.

MR. MELLENGER: Your Honor, at this time I would like to move Government Exhibits 140 through 149, 158 and 160 into evidence, which are Mr. Russo's work papers and also the chart, Government's Exhibits 159 dash 1 dash 2 dash 3 in evidence.

THE COURT: Mr. Murphy.

MR. MURPHY: I understand, your Honor, that 159 was the summary which the jury has been utilizing.

THE COURT: The work papers.

MR. MURPHY: I can't see the work papers, your Honor.

THE COURT: It has not been our practice here to send the work papers to the jury. I can not remember a case where we have, Mr. Mellenger, so I will not do it in this case. Again, ladies and gentlemen, we will, for your deliberation, but for the present I think until we hear further, you should just leave those summaries on the rail but remember what I told you in the beginning that these are summaries only and if you find that Mr. Russo's calculations are not supported by the testimony or the Exhibits in any particular, then as to that you should disregard or discount his conclusion so that the charts, whatever the numbers, will be marked in evidence and will be made available.

MR. MELLENGER: Your honor, may I be heard on the work papers or at least reserve the right to be heard on the work papers.

THE COURT: I will listen to you later on, Mr. Mellenger.

MR. MELLENGER: Subject to the work papers, then, your Honor, the Government rests at this point.

THE COURT: You rest. All right. I think it is now time I take something up with the lawyers and if you will go downstairs for a few minutes, ladies and gentlemen, we will have you back soon and continue with this trial. You may go with the Marshal. I will step off a minute and be right back.

(Recess taken at 2:45 p.m.)

* * * * * * * * * * * *

PROCEEDINGS: After recess, 2:55 p.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury not present.)

THE COURT: All right, we are back. The Government has rested. Mr. Murphy, do you have a motion?

MR. MURPHY: Yes, your Honor. At this time I move to dismiss Indictment Number CR.74-143, the United States of America vs. Joseph Gay on the ground the People have failed to prove a prima facie case.

THE COURT: I deny your motion. Mr. Mellenger, you wanted to make an application on these work sheets?

MR. MELLENGER: Yes. Your Honor, I believe a proper foundation for these work sheets has been established and Mr. Russo testified that he had prepared these and I think if the Court will look at these, these will aid the jury in going from the source documents, the various bank account records and stock ledger accounts in that each figure is indexed into one of these source documents which Mr. Russo used in adding up the various figures which he has summarized in the charts and Government Exhibit Number 159 which has been admitted into evidence.

THE COURT: He used this when he was testifying.

MR. MELLENGER: He used this when he was testifying but I believe - -

THE COURT: You see, it would have been a lot easier. I was wondering why you did not do that. If you made these copies available for the jury while he was testifying it would have made it easier for them to follow but you did not do that and Mr. Murphy now, I think, may be taken by surprise that you wanted to give this to the jury and I think that they heard the cross examination. I suppose in some instances, Mr. Murphy, it may be helpful for you to make certain points if you use these, or what is your attitude?

MR. MURPHY: Well, my attitude, your Honor, is this, the work sheets, the end results, yes, but I have never seen the work sheets go into evidence. It is like just - -

THE COURT: I thought you meant his written notes because in other cases, - hand that up. In other cases we put in the supporting papers as we have gone along.

MR. MELLENGER: If your Honor will notice on that first schedule which you are looking at it indexes the various Exhibit numbers where Mr. Russo got his information and those numbers will tie right in to the final product of the summarization, Government's Exhibit 159.

THE COURT: I mean, why didn't you bring this up before he got on the stand or as he was going? I hate to be picky about it but when he testified he followed this. He almost read it as it is.

MR. MELLENGER: Yes, that is correct. Your Honor, that would tend to explain the evidence and act as an index to the jury as to where these figures came from rather than giving the jury the end results which is 159, the charts and then a stack of documents when there is no transition between the stack of documents and the charts.

THE COURT: I understand giving it to the jury, and of course it makes an awful sheaf of papers if you give these to the jury. I thought you were talking about something else. I thought you were talking about a summary of what the witness was testifying.

MR. MELLENGER: No, I was not referring to those.

THE COURT: Of course, this is a summary of looking at Exhibits and also matching it up to what somebody has testified to, how he handled certain accounts.

MR. MURPHY: That, your Honor, would be like giving them his entire direct testimony to take downstairs.

THE COURT: I will mark it in evidence and if you want to question him further on cross examination you can do that.

MR. MELLENGER: Your Honor, I was under the impression I moved the charts in evidence and Mr. Knisley said he did not have it in his notes.

THE COURT: Maybe you did not mention the numbers, but all the big charts, and I will permit the small summaries to go in also.

MURPHY: May I see them, your Honor?

THE COURT: Yes. You may want to sit down with them, Mr. Murphy, and let me know if you want to ask Mr. Russo any further questions. I will step off and when you are ready to go, let me know.

(Government Exhibits Numbered 159, 159-1, 159-2, 159-3, 158, 160 received in evidence.)

Recess taken at 3:01 p.m.)

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PROCEEDINGS: After recess, 3:15 p.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury not present.)

THE COURT: Mr. Murphy, are there further questions of Mr. Russo?

MR. MURPHY: No, your Honor.

THE COURT: Mr. Murphy, do you have some witnesses?

MR. MURPHY: I have two witnesses.

THE COURT: Mr. White, have the jury come up. Are these character witnesses?

MR. MURPHY: No, your Honor.

THE COURT: They will be - -

MR. MURPHY: Perhaps we can discuss this, your Honor.

THE COURT: Call the jury and have them start up.

MR. MURPHY: As your Honor is aware, the defense in this case is a very simple one, that these were nothing more than an input of cash savings that accumulated over the years.

THE COURT: Right.

MR. MURPHY: And it is my intention, your Honor, to prove that Mr. Gay dealt in cash in large sums with regard to mortgages by calling the individuals that he gave the mortgages to and they will go back in years and it is our contention this is an accumulation. It may not, - some will deal with the years in question, some will not.

THE COURT: Some will be well before the years in question?

MR. MURPHY: Yes, your Honor.

THE COURT: And some may be within the time?

MR. MURPHY: Yes.

THE COURT: All right. I would think that in either event, Number 1, if it is certainly before the time, the fact that he had large amounts of cash on hand is appropriate to prove and secondly, if he had it within the time it would show that as far as cash on hand evidence, it might have been mistaken, whatever was said to the Special Agent about cash on hand perhaps was incorrectly stated by Mr. Gay for some reason or other or he just did not understand what the Agent meant, so have the jury come up and we will listen to the evidence. Thank you, Mr. Murphy.

MR. MELLENGER: Your Honor, I make one request that defense witnesses be excluded other than the one testifying.

MR. MURPHY: They are, your Honor.

THE COURT: All right. Only one witness at a time. Mr. Mellenger, so the jury's attention is not diverted from the witness, will you pick up those.

MR. MELLENGER: Yes, your Honor.

(Jury returns to the courtroom.)

THE COURT: Ladies and gentlemen, the Government has finished its case. Mr. Murphy will have some witnesses, as I understand it, and we will start hearing his proof now, so, Mr. Murphy, when you are ready if you will call your witnesses, please.

MR. MURPHY: Mr. Skotnicki.

FRANK J. SKOTNICKI (669 South Ogden Street, Buffalo, New York), a witness called by and in behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MURPHY:

Q Mr. Skotnicki, what is your occupation, sir?

A I am retired now as a roofer and business representative of Local 74.

Q All right, and how long have you been retired?

A Oh, about three years now.

Q Do you know the defendant, Joseph Gay?

A Yes, I do, his family, I guess most of them.

Q Okay. Now, how long have you known Mr. Gay?

A Well, ever since we were pretty small, I guess around 10 or 15.

Q All right. Did there come a time, sir, when you had occasion to enter into a business agreement with Mr. Gay?

A Yes. I was building a home. I needed money so I got a mortgage off Mr. Gay.

Q All right, and when was that, sir?

A Well, I got the papers here. That was September 20, 1958.

Q Can you tell me the amount of that mortgage?

A It was exactly $3,000.

Q And do you recall the day or do you recall the transaction itself, sir?

A Well, I believe it was in Messina's office that I received the $3,000 cash and that was in September.

Q Now, you say you received cash?

A Right, sir.

Q And who produced the cash there, sir?

A Mr. Gay.

Q All right, and then a mortgage was signed, is that correct?

A Right. I guess it was registered with the County too.

Q Whose name was the mortgage in?

A Do you mean who gave me the money?

Q No, no, whose name was on the mortgage?

A Mine and my wife's.

Q And how about, was it Mr. Gay or his wife?

A His wife and I guess Joe Gay was mentioned. I don't know if his name was mentioned or not. Mostly under his wife's name.

Q All right. Now, how did you repay this mortgage, sir?

A I was supposed to repay it in quarterly payments at 4 per cent but I didn't have to worry about penalties or anything like that. I could pay off as much as I wanted to plus interest quarterly.

Q 4 per cent interest and quarterly payments, is that right, sir?

A Correct.

Q Do you recall the last payment, or where did you make these payments?

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A. I usually delivered them to his wife.

Q. And in what form would you make them?

A. In cash.

Q. All right, and do you recall the last payment, sir?

A. No, I don't. I got a receipt when it was paid up in full but there is no date on it.

Q. All right. Do you have the receipt?

A. It is in my pocket.

Q. All right, sir.

A. It wasn't dated. I don't know what the date was. Three or four years later, I guess, three, maybe four at the most.

THE COURT: You will have to keep your voice up, Mr. Skotnicki.

THE WITNESS: Yes. It was three or four years later it was paid in full, the last payment.

BY MR. MURPHY:

Q. All right, and just, sir, what was the last payment, what amount?

A. $800.

MR. MURPHY: You may ask.

CROSS EXAMINATION BY MR. MELLENGER:

Q Thank you. Mr. Skotnicki, you said you had a mortgage instrument there?

A Right.

Q Was that drawn up by an attorney?

A Yes, Mr. Messina, Attorney at Law.

Q I believe you also testified that was filed in the Erie County Clerk's Office?

A Right. That's what it says on here.

Q You said you received $3,000 cash in Mr. Messina's office?

A Right, sir.

Q And who did you receive this cash from?

A Joseph Gay.

MR. MELLENGER: No further questions.

THE COURT: Anything else, Mr. Murphy?

MR. MURPHY: No, your Honor. I would like to, if I may, offer the mortgage instrument in evidence. I believe it would be - -

THE COURT: We will mark it, Mr. White.

MR. MELLENGER: No objection.

THE COURT: Mark the mortgage in evidence.

(Defendant's Exhibit Number 22 received in evidence.)

MR. MURPHY: I believe, your Honor, Mr. Skotnicki would like to have this back. May we photostat it?

THE WITNESS: You can mail it to me, sir. It doesn't matter, sir. I never had no trouble with Joseph.

MR. MURPHY: All right. Thank you, sir.

THE WITNESS: Am I finished?

THE COURT: Yes.

THE WITNESS: Thank you, sir.

THE COURT: Thank you, Mr. Skotnicki.

THE WITNESS: They can mail that to me.

MR. MURPHY: Thank you.

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IRENE KACZMAREK (63 South Ogden Street, Buffalo New York), a witness called by and in behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MURPHY:

THE COURT: Mr. Murphy, this certainly has nothing

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to do with the case but will you tell Mr. Skotnicki that now that this is paid, this instrument does not mean anything at all but he should be sure, and I am sure there is one filed, but a certificate of discharge.

BY MR. MURPHY:

Q Yes, your Honor. Mrs. Kaczmarek, are you employed?

A. No, sir.

Q And what is your present marital status?

A. I am a widow.

Q All right, and when did Mr. Kaczmarek pass away?

A. In July of '71.

Q And what did he do, ma'am, when he, - what form of work did he do?

A. He worked at the Steel Plant on Walden Avenue.

Q All right. Now, do you know the defendant, Joseph Gay?

A. I do.

Q And how long have you known him, ma'am?

A. Oh, a good thirty years I would say.

Q All right. Did there come a time that you and your husband entered into a business transaction with Mr. Gay?

A. No, sir.

Q Well, did you get a mortgage from him?

A A mortgage, yes.

Q All right, and when did you get the mortgage from him?

A In the year '63, May of '63.

Q Can you tell me how much that mortgage was for?

A For six thousand.

Q Six thousand?

A Yes.

Q And do you recall the transaction itself? Did you go to anybody's office?

A To Mr. Messina's office.

Q Now, who went to the office?

A My husband and I and Joe Gay and Mr. Messina was there.

Q All right, and who produced the money?

A Who produced the money? Joe did, Joe Gay.

Q And in what form did he produce it?

A Cash.

Q All right, and then you signed a mortgage?

A Yes.

Q And did you eventually pay that off?

A Yes, it was paid off.

Q And can you tell me how it was paid off?

A Well, we started out with $50 every three months plus 6 per cent interest but that went on for a while and then we just couldn't afford it and we would just call

Joe Gay and he says don't worry about it and pay him the interest and he would hold it and in fact he could have foreclosed on us a long time ago, which he didn't.

Q But in any event, you did eventually pay it off?

A. Yes.

Q Is that right?

A. Yes, with my son's help.

Q Can you tell me what the form of the payments were?

A. $50 it was supposed to be. That I paid off?

Q Yes, or your husband. Well, did you pay by cash or check?

A. Cash most of the time but toward the end by check because my son took over.

Q All right.

A. To help me pay it off.

Q Well when you first started, you were paying by cash?

A. Yes sir, yes sir.

MR. MURPHY: You may ask.

CROSS EXAMINATION BY MR. MELLENGER:

Q Mrs. Kaczmarek, do you know when that mortgage was paid off?

A. I believe it was in May of '75.

Q May of '75?

A. Yes.

I. Kaczmarek, for Defendant, Cross.

Q I am showing you what has been marked in evidence as Government Exhibit Number 98.

A. Yes.

Q Which is a photocopy of a mortgage instrument.

A. Yes.

Q Between Chester Kaczmarek and Irene Kaczmarek and I call your attention to the signatures on the reverse side.

A. That's mine.

Q That's mine?

A. My deceased husband's, yes. These two?

Q Yes.

A. Yes.

Q And you executed this instrument for the mortgage you just testified about, did you not?

A. I don't know. Is that the original or the second mortgage?

Q Take a look at it.

THE COURT: This is a copy.

THE WITNESS: Oh, it is Joe Gay's mortgage. I thought it was the one with the Marine Trust that we had years back.

BY MR. MELLENGER:

Q This is the mortgage you were testifying about.

A. Yes.

Q And this took place in Mr. Messina's office, you said?

A. Yes.

Q And Mr. Gay gave you cash for this mortgage?

A. That's right, it was cash, yes.

Q $6,000?

A. $6,000 cash, yes.

MR. MELLENGER: I have no more questions.

THE COURT: Any questions, Mr. Murphy?

MR. MURPHY: No, your Honor.

THE COURT: Nothing further this afternoon?

MR. MURPHY: I apologize, your Honor.

THE COURT: That is all right. Nothing further this afternoon. Very well. Ladies and gentlemen, we will be in recess now and on such a sunny day that is a pleasant thing to do once in awhile and we will resume tomorrow morning at, - we better make it 10:00 o'clock tomorrow morning and in the meantime follow my direction. Please do not talk about the case. You may walk out with the Marshal and we will see you at 10:00 o'clock in the morning.

(Jury escorted from the courtroom.)

THE COURT: Mr. Murphy, as I understand it, you believe that you will go tomorrow and into Thursday.

MR. MURPHY: Yes, your Honor, I would suspect. I have seven substantive witnesses scheduled for tomorrow. I have two character witnesses that I could bring in and I may have the defendant on Thursday.

THE COURT: It appears probably we will not be in session on Friday. If that is the case we would be coming back next week either Monday or Tuesday for summations and charge.

MR. MURPHY: Fine.

THE COURT: We will be in recess.

(Recess taken at 3:34 p.m.)

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

* *

THE UNITED STATES

-v-

JOSEPH J. GAY,

DEFENDANT.

CRIMINAL DOCKET
NO. 1974-143

* *

Proceedings of trial held before the HON. JOHN T. CURTIN, and a Jury, in Part I, United States Court House, Buffalo, New York, resuming on April 7, 1976.

APPEARANCES:

RICHARD J. ARCARA, United States Attorney, by RICHARD MELLENGER, Assistant United States Attorney.

ROBERT M. MURPHY, Esq., Attorney for the Defendant.

PROCEEDINGS: April 7, 1976, 10:18 a.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury present.)

THE COURT: Mr. Murphy, whenever you are ready.

MR. MURPHY: Yes, your Honor. Thank you. I call Mr. Mazur, please.

MR. MELLENGER: Your Honor, again I make all witnesses be excluded.

THE COURT: You only have to make it once, and you have the direction.

MR. MURPHY: Yes. There are no witnesses in the courtroom, your Honor.

THE COURT: All right.

THEODORE MAZUR (49 Clemo Street, Buffalo, New York), a witness called by and in behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MURPHY:

Q Mr. Mazur, what is your occupation, sir?

A Right now I am a teacher at Manpower on Main and Riley, teaching machine shop.

Q Prior to being a teacher, what was your occupation?

A Thirty-four years at Bethlehem Steel running a machine shop.

Q Mr. Mazur, do you know the defendant, Joseph Gay?

A I know him very well.

Q And how long have you known Mr. Gay?

A I would say thirty-five years.

Q Now, did there come a time, sir, when you entered into a business transaction with him in the form of a mortgage?

A Yes, I did.

Q And when was that?

A Do you want the exact date? I have the mortgage with me, but it is about fifteen years ago.

Q All right. Just give us the year if you will.

A 1959, 1960.

Q All right, and can you tell us the circumstances which give rise to your getting that mortgage, sir?

A Joe and I were friends for years, very good friends. He was always the little fellow, never as big. One day he was at a dancehall with his wife. She wasn't his wife then and some guy was making a play for his wife and Joe got - -

MR. MELLENGER: Objection.

MR. MURPHY: [illegible]o.

THE COURT: Let us start again. Mr. Murphy, will you put another question, please?

BY MR. MURPHY:

Q Just tell us the circumstances which gave rise to your getting the mortgage in 1959 or '60, which you indicated.

A All right. I was driving down Clinton Street and I see Mr. Gay crossing the street so I says to the wife, "Maybe Joe will let me have some money". I was making good money but I couldn't never save it. I had six children. They were sick and I could never save it so I stopped and I got out of my car and I stopped Mr. Gay and he says "Sure", and I says, "What will you charge me", and he says, "Five per cent", so I got nine thousand once and I got two more thousand a couple of months later.

Q All right. Now, the original nine thousand, where did you get it, sir?

A Well, in Messina, the lawyer's.

Q In the office?

A In the office right here on Court Street. I was afraid to walk out of the office with the money.

Q All right. Now, tell me how was the money given to you, in what form?

A. Tens, twenties, no checks.

Q Cash?

A. Yes.

Q $9,000 in cash?

A. Five once and two days later four.

Q Five thousand on one day and four thousand on another day?

A. Right.

Q In cash?

A. In cash.

Q Now then, the couple of months later you got, you said, two more thousand?

A. Yes, I did.

Q Where did you get that?

A. The same place because I needed money.

Q All right, and in what form was that money?

A. Same way.

Q Cash?

A. Cash, yes sir.

Q Now, did you repay this money, sir; did you repay this mortgage?

A. I repaid it about three years ago. It expired and Mr. Gay let me go a couple of more years. Yes, I did repay it.

Q You paid it in installments, did you?

A. Yes, I did.

Q. Now, over the years where did you make your payments to, - who did you make your payments to?

A. To Joe Gay's wife, Sally.

Q. And where?

A. Mailed them or sometimes we took a ride to their home on Fredro.

Q. Now, how did you make the payments, what form did you repay this mortgage in?

A. Cash and checks.

Q. Cash and checks?

A. Yes, sir.

Q. Over the years?

A. Over the years.

Q. Is that correct?

A. Yes, sir.

Q. Now, were there ever times, sir, when you were late in making payments?

A. Yes, there were.

Q. Did you ever suffer a penalty as a result of that?

A. No sir, I never did.

MR. MURPHY: Thank you, Mr. Mazur.

THE COURT: Mr. Mellenger.

CROSS EXAMINATION BY MR. MELLENGER:

Q Mr. Mazur, you said that Mr. Gay gave you the cash?

A. No, Messina.

Q Mr. Messina gave you the cash?

A. Yes, the lawyer.

Q Was Mr. Gay present at the time?

A. No.

Q Where did you receive this cash?

A. Right in his office on Court Street here.

Q Downtown?

A. Yes, Walbridge Building, I'm pretty sure.

Q I am showing you what has been marked as Government Exhibit Number 100 which is a mortgage instrument?

A. Right.

Q Would you look at that, please?

A. I know it by heart. That is it.

Q What is that?

A. That'a a, - oh, I didn't read it, whether it is the nine thousand, two thousand. That's the two thousand. That's the second one.

Q I call your attention to the signature on the reverse side.

A. Yes, me and my wife.

Q That is your signature, is it not?

A. Yes, it is.

Q Okay. For what purpose did you execute this document?

A. I needed the money, more money. Nine thousand wasn't enough. I thought it was, but it wasn't.

Q I call your attention to Government Exhibit Number 101.

A. That's the one.

Q That is a document you signed for the $9,000 mortgage, is it not?

A. Yes, it is.

Q So before Mr. Gay would lend you this money, he requested that you sign a legal document to that effect, is that correct?

A. I will be honest with you, I am the guy that insisted.

Q You insisted on the legal document?

A. Yes, I did.

Q Now, you said you were riding down the street with your wife?

A. Yes.

Q And you saw Mr. Gay crossing Clinton Street?

A. Yes.

Q And you said to your wife, "I wonder if Joe would lend me the money".

A. Yes.

Q Why did you think that Mr. Gay would have the money to lend you?

A. Joe Gay was always, ever since he was a little man, he was buying and selling whatever he could to make a buck. He was like me, had no education, nothing. He was only a little fellow then and he always, for some reason or another, he buys something, sells it. Always had a dollar.

MR. MELLENGER: No further questions. Thank you.

REDIRECT EXAMINATION BY MR. MURPHY:

Q Sir, the United States Attorney asked you the purpose for which you borrowed this money. Were you building a home at the time?

A Yes, I was.

Q And is that why you borrowed the money?

A That's the only reason.

MR. MURPHY: Thank you.

THE COURT: That is all.

MR. MELLENGER: That is all, your Honor.

THE COURT: Thank you, Mr. Mazur.

THE WITNESS: Thank you, sir.

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EDWARD J. TOKARCZYK (82 Weiss Street, Buffalo New York), a witness called by and in behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MURPHY:

Q Mr. Tokarczyk, what is your occupation, sir?

A I do refrigeration work.

Q And are you employed by any company?

A Yes, I am, by the Meyer Store Fixture Sales and Niagara China Equipment Company.

Q Now, do you know one Joseph Gay, sir?

A Yes, I do.

Q And how long have you known Mr. Gay?

A Oh God, it would be at least thirty years or better.

Q All right. Now, did there come a time, sir, when you and Mr. Gay entered into a business transaction in the form of a mortgage?

A Yes.

Q And can you tell me when that was?

A It was in March of 1963.

Q And did Mr. Gay lend you some money at that time, sir?

A Yes, he did.

Q How much?

A $3,500.

Q Now, what were the circumstances that gave rise to that, Mr. Tokarczyk?

A. Oh, I wanted to buy a, - I was in business at the time and I wanted to buy a little building and I need some money and I asked him for a mortgage.

Q. All right, and where did you receive the money itself?

A. Joe's home.

Q. All right, and what was the form of the payment that you received?

A. Oh, I received it in cash.

Q. At his home?

A. Yes.

Q. Now, did you execute a mortgage, sir, for that; did you sign a legal mortgage that was filed?

A. Yes.

Q. All right, and did you repay the money?

A. Yes, I did.

Q. Where did you repay it?

A. I gave it to Joe.

Q. You would give it to Joe?

A. Yes.

Q. In what form?

A. Cash or check, whatever I had.

Q. Whichever you had?

A. Yes.

Q. Correct?

A. Correct.

Q. And has that mortgage been paid off, sir?

A. Yes, it has.

Q. And this was installment payments, was it?

A. Yes, it was.

Q. When was the final payment made, if you know?

A. I believe about a week ago or a week and a half.

Q. So that would be it ran for some ten or eleven years?

A. That's right.

Q. Now, did it originally start out to run for ten or eleven years?

A. No.

Q. All right. How long was it supposed to have run?

A. Until 1968.

Q. All right. Were you able to make all the payments by '68?

A. No. I just paid the interest on the mortgage.

Q. All right. Now, what was that, how much was that?

A. That was six per cent.

Q. Did you suffer any penalty as a result of not paying it up on time?

A. No, not at all.

MR. MURPHY: All right. You may ask.

CROSS EXAMINATION BY MR. MELLENGER:

Q. Mr. Tokarczyk, I show you Government Exhibit Number 102 and ask you to look at that and especially on the reverse side thereof and call your attention to the signature. Is that your signature on that document?

A. Yes, it is.

Q And that is the mortgage instrument which you signed to represent the loan which you got from Mr. Gay, is it not?

A. Yes, it is.

Q And where did you sign this?

A. At Bakos Real Estate, I believe it is.

Q Okay, but you didn't receive the money at that time?

A. No, I didn't.

Q And did you receive the money before or after you signed this instrument?

A. I really don't recall now.

Q You don't recall?

A. No, I don't.

Q Do you receive the money at Mr. Gay's home, though?

A. Yes.

Q In the form of cash?

A. Yes.

Q Now, you said you just recently paid it off?

A. Yes, I did.

Q Isn't it a fact you made one payment a year on that mortgage?

A That's correct.

Q Okay, and what was the amount of those payments?

A I believe it was supposed to be a hundred dollars per year plus interest.

Q Do you remember whether you made a payment in 1967?

A No sir, I wouldn't remember.

Q How about '68?

A I really wouldn't remember. I would have to either check through the checks or receipts that I have.

Q That mortgage calls for one payment a year, did it not?

A Yes, it did.

Q Did you normally make one payment a year?

A If I could, I did.

MR. MELLENGER: Okay. I have no further questions.

MR. MURPHY: Thank you, Mr. Tokarczyk.

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STAN TOPORCZOIK (75 Nash Avenue, West Seneca, New York), a witness called by and in behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MURPHY:

Q Mr. Toporczoik, what is your occupation, sir?

A I am a maintenance welder.

Q And by whom are you employed?

A At Worthington Corporation.

Q Do you know Mr. Joseph Gay, sir?

A I do.

Q And how long have you known Mr. Gay?

A Practically all my life.

Q Which would be how long?

A Oh, fifty years.

Q All right. Now, did there come a time, sir, when you entered into a business transaction with Mr. Gay in the form of a mortgage?

A I did.

Q And when was that?

A In March of 1962.

Q And did Mr. Gay lend you some money at that time?

A He did.

Q And how much did he lend you?

A $6,000.

Q Can you tell me where you received that money, sir?

A I am pretty sure that happened when we went in there to buy the home with the Abstract Title and Mortgage or Mr. Messina which happened to be the transacting lawyer, his office. It was either one of those places.

Q You were in the process of buying a home, were you?

A. That's correct.

Q All right. Now, can you tell me the form that the money was given to you in, what form it took?

A. Do you mean cash or check?

Q Cash or check.

A. Check.

Q Check?

A. Yes.

Q What kind of check was it, sir?

A. A regular transaction check made out to me.

Q All right. Now, was it, if you recall, a Bank of Buffalo check?

A. Oh, that I wouldn't know.

Q All right.

A. No way.

Q In any event, did you repay this mortgage, sir?

A. Not complete.

Q All right.

A. Not complete.

Q All right, and what did the term of the mortgage call for, how long?

A. The terms called for five years.

Q So that would be '67 it should have been paid?

A Yes, but I didn't pay it.

Q All right.

A I still have a payment coming on it and that was every three months and that was a hundred dollars principal plus interest.

Q All right. You paid a hundred dollars principal plus interest every three months, is that correct?

A Yes.

Q Now, you say it should have been paid in '67 and to this date it has not been paid, is that correct?

A No.

Q Have you ever suffered any penalty as a result of that?

A None whatsoever.

Q Did Mr. Gay ever threaten to foreclose?

A No, no.

Q Now, when you made these payments where would you make them to, sir?

A I went to his home.

Q All right, and in what form did you repay the money in?

A Always cash.

MR. MURPHY: You may ask.

CROSS EXAMINATION BY MR. MELLENGER:

Q Mr. Toporczoik, showing you what has been entered into evidence as Government Exhibit Number 103 which is a bond and mortgage instrument purportedly between Stanley Toporczoik.

A. That's me.

Q. That is you?

A. Yes.

Q. And Stella Gay?

A. And my wife, of course.

Q. I call your attention to the reverse side. Is that your signature?

A. That is correct, yes sir.

Q. This is the instrument which you had executed as evidence of that mortgage loan Mr. Gay gave you?

A. It must be.

Q. Do you remember where you executed this document, sir?

A. It had to be at Abstract, Title and Mortgage because I don't recollect being, - is the Abstract, Title and Mortgage in the Erie County Building?

Q. There is one right across the street from here.

A. Well, in that vicinity.

Q. In any event, it was downtown?

A. That is correct.

Q. You said you received the proceeds of this loan in the form of a check?

A. Yes.

Q. And who gave you the proceeds? Was it Mr. Gay personally or Mr. Messina?

A. I don't know who gave me the check but I know I had it. I'm pretty sure it was Joe that gave it to me or else his lawyer, one or the other.

MR. MELLENGER: No further questions.

MR. MURPHY: Thank you.

THE COURT: Thank you, Mr. Toporczoik.

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JOHN A. BYCINA (241 Fenton Street, Buffalo, New York) a witness called by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MURPHY:

Q Mr. Bycina, what is your occupation, sir?

A I am a Buffalo Police Officer in the City of Buffalo.

Q All right, and what is your assignment in the Buffalo Police Department?

A I am assigned to B District Detectives.

Q Do you have any other job, sir, other than the Buffalo Police Department?

A Yes. Part time I do teach school.

Q And where do you teach?

A John F. Kennedy High School.

Q All right. Now, do you know Mr. Joseph Gay, sir?

A Yes, I do.

Q And how long have you known him?

A All my life.

Q All right, which would be approximately how long?

A I am forty-eight.

Q All right. Now, did there come a time, sir, when you entered into a business transaction with Mr. Gay in the form of a mortgage?

A Yes, I did.

Q And can you tell me when that occurred?

A Approximately 1960.

Q All right. Now, did Mr. Gay lend you some money at that time?

A Yes, he did.

Q What was the purpose of you borrowing that money?

A I purchased a home in my community.

Q All right, and how much money did Mr. Gay lend you at that time?

A $10,000 in cash.

Q Now, where, Mr. Bycina, did the transaction take place?

A In Crucian Messina's office, the lawyer's office.

Q Were you there?

A Yes, I was.

Q Was Mr. Gay there?

A. Yes, he was.

Q. All right, and he brought you ten thousand in cash?

A. Yes, he did.

Q. All right. Now, what were the terms of the mortgage?

A. Five per cent a year.

Q. All right, and when was that to be paid back?

A. On the basis that I could afford and yearly, half year, quarterly, whenever I had the money I would give it back to him, usually it was every half year or a year I paid back.

Q. You would pay it back.

A. Right.

Q. Now, did there come a time, sir, when you missed payments?

A. Yes, I did.

Q. All right, and did you suffer any penalty as a result of that?

A. No, sir.

Q. Now, when you did pay it back, what form did you pay it back in?

A. Cash.

Q. And where were these payments made?

A. In his home.

MR. MURPHY: You may ask.

CROSS EXAMINATION BY MR. MELLENGER:

Q Mr. Bycina, I am showing you Government Exhibit Number 97 in evidence and ask you to take a look at that, please.

A I can't see too good. I haven't got the glasses. I can't see it. It is blurred.

Q You can't see that. Well, in any event, Mr. Bycina, did you execute a bond and mortgage instrument as evidence of this loan?

A Yes, I did. What do you mean by "bond and mortgage"?

Q Well, you said that Mr. Gay made you a loan, I believe, in the amount of $10,000 cash?

A Right.

Q This was in Mr. Messina's office?

A Crucian Messina's office, right.

Q Did you sign anything at that time?

A Papers, I believe.

Q You did sign some papers?

A Well, Mr. Fronczyk, the real estate lawyer took care of it.

Q Okay, but you did sign some papers?

A Yes, papers.

Q Relative to this loan?

A Yes.

Q And when did you first ask Mr. Gay to loan you money?

A I would say approximately maybe 1959. I was interested in, - the wife was interested in a house in the community. Maybe a month or two before I got the money.

Q Okay, and do you remember where you asked Mr. Gay for this loan?

A. Could be by the church or by the home. He lived directly across the street from where I was renting.

Q Is this loan paid off at this time?

A. I owe approximately, I believe about $2,000.

Q You still owe him $2,000 at this time?

A. Right.

Q And you received this loan from Mr. Gay in 1960, is that right?

A. Right.

Q Did you make payments in the years 1967 through 1971?

A. I couldn't recall. Some years I did skip, a year and a half, and then I did pay him as much as I could.

Q In any event, you wouldn't have skipped the payments for a five year period?

A. I couldn't recall offhand. I paid him as I could. The majority of it I believe I paid him every year.

Q But you have missed payments for five years in a row?

A. No.

MR. MELLENGER: No further questions.

MR. MURPHY: That is all, Mr. Bycina.

THE WITNESS: Thank you.

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DOROTHY HOBART (157 Bassett Road, Williamsville, New York), a witness called by and in behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MURPHY:

Q Mrs. Hobart, are you married?

A. Yes, I am.

Q And do you have a family?

A. Yes, I do.

Q And what does your family consist of?

A. I have three children, two girls and one boy.

Q All right. Now, are you related to Mr. Joseph Gay?

A. Yes, I am.

Q And how are you related to him?

A. The gentleman is my father.

Q All right. Now, are you employed or do you have a profession?

A. Yes, I do.

Q And what is your profession?

A. Well, I was formerly a public school teacher and at present I am retired and I teach dancing.

Q Now, when you say "retired", you don't mean that you are - -

A. I am not active in the teaching profession at the moment, yes.

THE COURT: Are you talking about age, Mr. Murphy?

BY MR. MURPHY:

Q But you do hold a New York State Teacher's Certificate?

A Yes. I have a permanent certificate to teach language arts and social studies.

Q Did you ever teach in the Buffalo System?

A Not in the Buffalo System.

Q Where?

A I taught in a suburban area, Lancaster Central School System.

Q All right. Now, when were you married?

A I was married in 1963.

Q All right.

A August of 1963.

Q Prior to your marriage, where did you receive your education?

A I received my Bachelor of Arts at D'Youville College and after marriage I received a Master's of Science in Education from Canisius College.

Q Now, during your growing up period, Mrs. Hobart, during the period of your early years, were you familiar with where your father was employed?

A. Yes.

Q. And could you tell us where that was, please?

A. Well, he was a printer and he was employed as a liquor salesman. To my recollection, those are the only two that I can recollect at the moment.

Q. All right, but he has always been a printer, as far as you know?

A. Yes, as far as I know, yes.

Q. All right. Now, during the course, or prior to your marriage, were you gainfully employed at all yourself?

A. Yes, I was.

Q. And when would those years have been?

A. Well, I worked ever since I was a senior in high school. That would have been at the age of 17. I taught dancing at that point on a part time basis so I always had a part time position there and then in 1960 when I graduated from college, I was a full time school teacher at that point.

Q. All right. Now, while you, - prior to your marriage and while you were gainfully employed, where were you living?

A. I was living at home with my mom and dad.

Q. All right. Were you required to make any contributions to the home?

A. I wouldn't call it a requirement, but I did make contributions to the home.

Q And in what form?

A I paid my parents a certain amount every two weeks when I received my paycheck.

Q All right. How much did you pay?

A I believe it was $40 every two weeks.

Q Now, following your marriage, did there come a time when you and your husband purchased a home?

A Yes, we did.

Q All right, and did your father help you in that purchase at all?

A Yes, he did.

Q And can you tell me when that occurred?

A That occurred May, 1965.

Q All right. Now, what was the form that your father helped you, how did he help you?

A Well, my father provided a loan for us for a certain amount of money.

Q How much?

A It was $15,000.

Q Do you recall the specific transaction itself?

A My dad had cash at home and since I was going to be going alone to foreclose with the lawyer, Mr. Messina he got a bank draft for me and I carried the bank draft the next day and we closed on the home at that point.

Q Now, you say your dad had cash for you?

A Yes.

Q Did he attempt to give you cash?

A Yes, but since I was going alone, I didn't like carrying that amount of money. I didn't think that was a wise type of thing to do.

Q How much cash did he attempt to give you?

A It would have been $15,000.

Q All right. Now, you say then there was, - the next day he provided a draft for you?

A Yes, a bank draft.

Q And you went to whose office?

A Crucian Messina, the lawyer's.

Q Did you execute a mortgage?

A It was basically a loan. It was a loan and I don't think there was anything on paper as far as I know. I really don't know and my dad was nice enough to provide the money and I never really asked any questions about it.

Q All right, but in any event - -

A But basically, I took it as a mortgage, yes.

Q All right. In any event, when you went to Mr. Messina, did he close the transaction for you? When I say "close" I mean was he the attorney when you bought the house?

A Yes, most definitely.

Q And you went to the County Clerk's Office?

A Yes. He accompanied me there and we met the lawyer and the other party and we closed.

Q All right. Now, has that loan been repaid?

A A good portion of it has.

Q All right, and what form has the payments been made, what form did you make them in, the payments?

A I believe we gave my father checks every so often.

Q All right.

A I think we did it by check, yes.

Q All right. Now, he has never dunned you for payments, has he?

A Oh, definitely not.

Q Is there any interest on this?

A No, it was an interest free loan.

Q All right. During the course of your lifetime, were there times, Mrs. Hobart, when both your mother and your father took trips together?

A Yes, they did.

Q All right, and did they take them while you were living in the home?

A Yes, they did.

Q Now, during those trips, were you, - did your father give you any instructions with regard to the home in the event that something would happen to both he and your mother?

A. Yes. He told me if anything happened I was to look in certain places because there would be money there and if anything happened I was to look in these areas and I would find it.

Q. All right, and what areas did he mention?

A. Well, the one area was the attic space and the other space was, - we had an attic space in our home and the other area was the basement.

Q. Now, did you ever, out of curiosity, while they were gone, search these areas?

A. No, I never did.

Q. All right. It was just in the event that something were to happen.

A. I was to look there, yes.

Q. And there would be money there?

A. Yes, definitely, right.

MR. MURPHY: You may ask.

CROSS EXAMINATION BY MR. MELLENGER:

Q. Mrs. Hobart, Mr. Murphy asked you about your father's occupation and you said you knew he was a liquor salesman once and a printer?

A. Yes.

Q. Did you ever know him to have any other occupation besides those two?

A I believe at one point he owned a tavern and I think during the war years. It is hard for me to be exact because I was a very small child. I know my parents talked about a tavern and I was maybe a year old or so, so I don't recollect that, and I think my dad may even have worked at some war plants, the Public Works Program, something like that, but again, this is hazy because I was a very small child and I wouldn't recollect that readily.

Q How about the more recent years, more specifically 1967 through 1971, did you ever know him to have any other occupation than a printer or a liquor salesman?

A I don't believe so. I don't remember when he started to work for my brother-in-law. He might have started during those years but I am not absolutely certain.

Q Did you ever know him to work at the Park Lounge or Gay's Lounge?

A No.

Q Did you ever know whether he has owned any interest in Gay's Lounge or the Park Lounge?

A No, I don't know exactly.

Q You said he was a printer. Do you know exactly what he printed?

A Yes. He, on a regular basis, printed funeral cards for a funeral home. This was a steady position that he had. He printed invitations. He printed program books. In fact, he takes care of our program books each year for our big program at the end and the normal things that a printer would do.

Q Now, you said you took a mortgage loan or he gave you a mortgage loan and what was the amount of that?

A. $15,000.

Q And you had stated that he attempted to give this to you in cash?

A. Yes.

Q Okay, and where was this, where did he attempt to give you this money in cash?

A. Well, it would have been at his home.

Q Would have been at his home?

A. Yes.

Q You stated you didn't want to take it in cash?

A. No. I didn't think that would be a wise thing to do.

Q Why is that?

A. Well, I myself don't like carrying that amount of money when I am alone and going somewhere.

Q Did you tell this to your father?

A. I don't recollect. I must have told him because he got the bank draft.

Q When did he get the bank draft?

A. I believe I had the bank draft the night before we were closing.

Q. And he gave you the bank draft?

A. Yes.

Q. And where was this?

A. This would have been at my apartment at that point.

Q. And where was that?

A. That would have been on Joseph Street in Cheektowaga.

Q. It wouldn't have been at Mr. Messina's office?

A. No, because as I can recollect, - don't forget this has been 11 years ago and to my recollection, to the best of my ability at this point, I say that in the back of my mind I remember getting that at the apartment and not at Mr. Messina's office, but again, it has been 11 years, you know, and the details, I never thought I would have to answer to all these details, so there is a little bit of haziness in my mind.

Q. Now, you said 11 years ago. That would be 1965, the year you received the loan?

A. Yes.

Q. And you testified you made payments on this loan?

A. Yes.

Q. And you still owe a certain amount on this loan, is that correct?

A. Yes.

Q How much do you owe at the present time?

A. Approximately $10,000.

Q And the original loan was $15,000?

A. Yes.

Q And what were the amounts of the payments which you made to your father?

A. I sometimes would give him a full amount at the end of one year which would have been eight thousand dollars and sometimes as far as I can recollect, I might have even given him something like on a three month basis maybe $250 on a three months basis. I don't think it was like a steady, you know, inflow there.

Q And how did you pay him back, cash or check?

A. I answered that. I said I think I normally gave him a check.

Q Do you have any recollection of the dates of payment of these checks?

A. That would be very difficult. I would have to, - I don't even know if I have the checks. I would have to go look at the checks. I really find it very difficult to answer that truthfully.

Q Did you make any payments during the years 1967 through 1971?

A. Not to my recollection.

Q Not to your recollection?

A Let's see, yes, I might have in '67, I might have. It is very difficult. As I said, I could have, but I don't quite remember.

Q Now, you stated that your parents, your mother and father had at times took trips?

A Yes.

Q Where did they take these trips to?

A They have gone to various places. They went to the Bahama's one time. I think they went to Bermuda one time. They went to Spain one time. You know, to Florida.

Q Did they take any trips during the years 1967 through 1971?

A I am sure they did.

Q Do you remember where they went and what year?

A Oh dear, let's see. I know they did because they normally have taken a trip almost once a year.

Q Almost once a year?

A Yes, at least once a year. They could have taken a trip to Florida during a part of that time. It is difficult for me to say. I really, - because it has been a while.

Q They normally take one trip a year, though, is that correct?

A I think approximately, yes.

Q. And when they took these trips, let's say to Florida or the Bahama's, how did they go there?

A. With a travel group. Normally with some travel group.

Q. What was the normal duration of these trips?

A. Oh, seven days, I would say.

Q. So they normally take a one week trip every year?

A. Approximately, yes.

Q. And when they took these trips your father would tell you to keep an eye on the house?

A. Yes, he did.

Q. And he told you in the event anything happened to he and your mother you should look certain places?

A. Yes, he did.

Q. Did he tell you what you would find in these places?

A. Yes.

Q. What was that?

A. I feel I have already answered that but I will repeat it again. He told me there was a great deal of money and there would be important papers.

Q. He told you to look in the attic and basement?

A. That is correct.

Q. And you stated that you never looked in these places, is that correct?

A. No, I never did.

MR. MELLENGER: I have no further questions.

THE COURT: Mrs. Hobart, can you wait just a minute?

THE WITNESS: I am sorry.

REDIRECT EXAMINATION BY MR. MURPHY:

Q Mrs. Hobart, would the Clinton Business Men's Association, would that jog your memory with regard to these yearly trips?

A. Yes. Some of them, I believe, were in affiliation with the tours that this Association did sponser, yes.

Q And your father belonged to the Clinton Business Men's Association?

A. Yes, he did, and still does.

MR. MURPHY: Thank you.

THE WITNESS: You are welcome.

MR. MELLENGER: Nothing further.

THE COURT: All right.

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LORRAINE RUSSO (3 Briarhill Road, Orchard Park, New York), a witness called by and in behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MURPHY:

Q Mrs. Russo, are you any relation, - I am sorry. Are you married and have a family?

A Yes.

Q And what does your family consist of?

A My husband and three children.

Q And what are the children?

A I have three sons.

Q All right. Now, are you related to the defendant, Joseph Gay?

A Yes. He is my father.

Q All right, and are you employed outside the home at the present time?

A Yes, I am.

Q And in what capacity?

A My sister and I run a small dancing school business.

Q And you are in partnership with your sister?

A Yes, I am.

Q How long have you been in that business?

A Approximately 16 years, somewhere in that vicinity.

Q All right. Now, other than the dancing school business, do you have a profession?

A Yes, I did work as a school teacher for a few years.

Q All right, and where did you teach and when?

A I taught at Kensington High School from September of

'58 to June of '62.

Q All right. Are you certified by New York State as a teacher?

A. Yes.

Q Permanent certification?

A. Yes.

Q Now, what does your husband do?

A. He runs an electrical distributing wholesale house.

Q And what is the name of it?

A. South Park Electric Company.

Q All right. Now, when were you married?

A. In April of '61, I think, 15 years ago tomorrow.

Q Tomorrow?

A. Right.

Q Now, prior to your marriage and after you, - did you teach prior to your marriage?

A. Yes. I taught prior to my marriage.

Q Were you also in the dancing school business prior to your marriage?

A. Yes, I was.

Q Now, out of your earnings did you make any contributions to the home?

A. Yes, I always paid what was known as a boarding and room sum.

Q And can you tell me how much that was?

A. It was $40 at that time.

Q. Which would have been every two weeks?

A. Yes.

Q. All right. Who did you pay this to?

A. My mother.

Q. Now, where did you receive your education?

A. Are you talking about from elementary school or college or - -

Q. No, no, from college.

A. I went to D'Youville College for four years and then I got my Master's from Canisius.

Q. All right. Did there come a time, - strike that. During your early years, - are you older or younger than your sister?

A. I am older.

Q. All right, and do you know what occupations your father had over the years?

A. Well, the one I remember the most was his being a liquor salesman.

Q. All right.

A. I also know he worked in war plants. I can remember that and I can remember a tavern when I was very little.

Q. And how about the printing business?

A. Oh, yes. He always was a printer and he still prints.

Q. He still prints?

A. Yes.

Q. All right. Now, following your marriage, did there come a time when you and your husband purchased a home?

A. Yes.

Q. And when was that?

A. September, October of '62.

Q. Where was this home that you purchased?

A. In West Seneca.

Q. All right. Did your father help you with the purchase of that home at all?

A. Yes, he did.

Q. All right, and can you tell me how he helped you?

A. He gave us a loan for a portion of the mortgage.

Q. All right, and what was the amount of that loan?

A. $13,000.

Q. $13,000?

A. Yes.

Q. Do you recall the actual transaction itself?

A. With my father?

Q. Yes.

A. We just came over to his house and he gave us the money.

Q. All right. How did he give it to you, what form?

A. A lunch bag.

Q. All right. Was it cash or was it a check?

A. It was cash.

Q. And it was in a lunch bag?

A. Yes.

Q. All right. Was your husband there with you?

A. Yes.

Q. All right. Now, was this the whole thirteen thousand in cash?

A. Yes.

Q. And can you tell me how you utilized that? When did you close after receiving that money?

A. Well, I don't know if it was the day after or a couple days or a few days after. I can't remember that and I think it was my husband who got it into a check, took it to the bank.

Q. He got it into a check?

A. Right.

Q. Now, did you make repayments on that loan?

A. Yes.

Q. And what form were the repayments in?

A. Well, my husband I think ordinarily paid in cash.

Q. All right. Now, tell me who takes care of the finances in your house?

A. My husband.

Q. Now, do you recall during your early years and shortly after you were married, your mother and father ever taking trips together?

A. Yes.

Q. All right. Now, were you ever given any instructions with regard to anything in the home or the home itself of your parents while they were on these trips?

A. Well, this was after I was married. There was one time when I think they were going overseas and my father said that should anything happen that there was papers or I think he just said a large sum of money.

Q. All right, and did he tell you what area or where it was?

A. He very briefly just said it was in a certain space in general.

Q. He said what?

A. He said attic space.

Q. Now, what was the attic space in your home?

A. Well, it was like a crawl, I guess. You had to get to it through a closet, you know, up in the ceiling.

Q. I see. It is not a regular attic?

A. No. This house didn't have a regular attic, no.

Q. What form house does your father live in?

A. A ranch.

Q. So this would be like a crawl space?

A. Yes, right.

Q. Did you ever check that area while they were on a trip?

A. No.

Q. Now, this loan that you received in the amount of $13,000, was that an interest bearing loan?

A. No.

Q. Just pay it back?

A. Right.

Q. Any particular schedule for paying it back?

A. There was none set up by my father but I think my husband tried to do it every three months, he would pay a portion.

MR. MURPHY: Okay. You may ask.

CROSS EXAMINATION BY MR. MELLENGER:

Q. Mrs. Russo, you stated that your father's occupation, to the best of your recollection, that he used to own a tavern, used to be a liquor salesman and he was a printer. Do you know exactly what he printed?

A. Well, he did most of the funerals in the neighborhood that we lived in as a child growing up for two major funeral homes that I remember and I remember program books for the churches and I remember tickets, wedding invitations and things of that nature.

Q. Did you know him to print anything else?

A. Other than program books and that, no, I don't recall.

Q. Calling your attention to the years 1967 through 1971, do you know your father to have any other occupation during those years?

A. Not to my knowledge.

Q. You said your husband owns South Park Electric, is that correct?

A. Yes. I wouldn't say he owns it. He runs it.

Q. He runs it. Do you know who owns it?

A. Well, it would be stockholders, primarily members of his family.

Q. Okay. Do you know your father to own any interest in South Park Electric?

A. I believe he does now.

Q. And how much of an interest is that, how much of an investment did he put in it?

A. I have no idea.

Q. Did you ever know your father to work for South Park Electric?

A. Yes.

Q. In what capacity?

A. I don't know what he does in the office. I just know that he is there, runs computers, things like that.

Q. Did you ever hear of a tavern called Gay's Lounge or Park Lounge?

A. Yes.

Q. Do you know who owned that?

A. At one time my father and uncle owned it but then I don't know exactly what year but my uncle bought my father out.

Q. And do you know when was this?

A. It was open, - I think it was '60, sometime in, - it was February of '60 I believe.

Q. And your father owned an interest in that?

A. Yes. I believe it was fifty per cent.

Q. And when did your uncle buy him out?

A. I have no idea.

Q. You said you received a mortgage loan in 1962 from your father in the amount of $13,000 cash?

A. Yes.

Q. And you said he gave you this money in a lunch bag?

A. Yes.

Q. And where did this take place?

A. In his home.

Q. In what room in his home?

A. I think we were in the living room. I'm not even sure.

Q. And you mentioned that at one point your mother and father went overseas on a trip?

A. Well, they have gone overseas more than once.

Q. Okay. You said at one point he was going overseas and he told you if anything should happen you should check certain places in the house?

A Well, he mentioned just very casually that if something should happen I might find things up in the attic space.

Q Did he say anything about the basement?

A Not to me, no.

Q And when did he mention this to you?

A Gee, I don't know. It has probably been mentioned to me perhaps several times since he takes several trips a year.

Q Several trips a year or one trip?

A I am not sure. It might be one trip or it might be two.

Q Did he say anything to you about checking the attic in the years 1967 through 1971?

A You know, I can't specifically remember. I don't think it was mentioned to me more than a couple of times.

Q Getting back to the mortgage payments, you say your husband handles all the finances.

A Pretty much, yes.

Q Do you know the amounts of the mortgage payments that he makes to your father?

A I think in the beginning he paid $250 every three months.

Q Do you know what payments he made to your father between the years 1967 through 1971?

A I really don't know specifically, no.

Q Do you know whether he made any payments?

A. I am not positive.

Q. Did you execute any kind of instrument as evidence of this loan?

A. There was a mortgage paper drawn up and I remember we went to a lawyer, Crucian Messina, where the transaction was originally made.

Q. Are you paying any interest on this mortgage loan?

A. No, there never was any interest. It was understood that way from the start.

Q. Do you love your father?

A. Very much, yes.

MR. MELLENGER: No further questions.

REDIRECT EXAMINATION BY MR. MURPHY:

Q. Would it be fair to say that with regard to this Park Lounge whether or not your father owned it or don't own it you have no specific knowledge of that, is that right?

A. I knew nothing about the Park Lounge except I went to their grand opening, I think it was February, because I believe that was the night I met my husband and that's why it sticks in my mind.

Q. You met him in the Park Lounge?

A. No, I went there first and then I was drawn to go to a dance with some of my friends. They all coaxed me to go to a dance and I met him at the dance afterwards.

Q. But as to the actual ownership, you don't know anything about that?

A. No, I really don't. I just know my father and uncle were there and they were working at that particular time, that's all.

Q. All right. Do you know who owns it now?

A. Well, my uncle, I believe.

Q. All right. You don't know if it is his wife that owns it?

A. No, I don't know anything about that.

THE COURT: What is the address of the Park Lounge, please?

THE WITNESS: It is on Clinton Street. The exact number, I don't know.

MR. MELLENGER: No further questions of this witness.

THE COURT: The reason I asked that, I just thought someone said South Park Avenue and I wanted to clear it up but it is on Clinton?

THE WITNESS: The lounge is on Clinton Street, yes.

THE COURT: Nothing further?

MR. MURPHY: Nothing.

THE COURT: Thank you. Mr. Murphy, do you want to take a recess for awhile? We will be in recess about ten minutes, fifteen minutes and then we will return, ladies and gentlemen, and continue with the trial of this case. You may walk out with the Marshal. Spectators keep your places while the jury goes out.

(Jury escorted from the courtroom.)

THE COURT: We will be in recess.

(Recess taken at 11:15 a.m.)

* * * * * * * * * * * * *

PROCEEDINGS: April 7, 1976, 2:40 p.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury not present.)

THE COURT: Before the jury comes, it seems to me, so we have the ground rules here, as I understand it, Mr. Murphy, you propose to have character witnesses testify. These are witnesses that I suppose the more correct term is reputation witnesses because from talking to people in the community, whether general community or business community or any other community which they and the defendant have had contact, they have come to a conclusion on reputation for truth and honesty from talking to various people about this reputation. On cross examination the Government proposes to question the witnesses on whether or not they have heard of a particular events in the defendant's life which arguably may tend to change the character witnesses' opinion as to truth or honesty. It seems to me that under Rule 608 of the Federal Rules of Evidence and as the law still would be the same as discussed in greater detail in McCormick on Evidence at Section 191 that these kind of questions are permitted. The intent is not whether or not a man committed certain acts, whether or not he did certain things, but whether or not the witness heard about certain events. We are not concerned with whether or not these events occurred at all but simply whether or not the witness heard about them. If the witness heard about them, then it may, of course, change his testimony arguably and if he had not heard about them then again arguably if he had heard it might change his testimony so I would, under the circumstances, permit Mr. Mellenger to inquire along these lines.

MR. MURPHY: Yes.

THE COURT: Is there anything more you want to say? We weren't on the record before, Mr. Murphy. Is there anything you want to say at this time?

MR. MURPHY: The other question brought up is in the event the defendant would take the stand, we have the situation where as I view the recent law which has come down on this subject, the United States Attorney would not be able to ask about arrests, would not be able to ask about the two, - the one conviction, - one is so far away in time and the other, I don't believe would relate to credibility. I understand we are in the unique case but I think for him to suggest criminal activity on the part of the witness without any proof thereof, would prejudice the defendant to such an extent that he could not have a fair trial.

THE COURT: What about that, Mr. Mellenger?

MR. MELLENGER: Well, your Honor, as we discussed in chambers, I believe that under the new rules this would be highly prejudicial and the United States Attorney's office has not been able to come up with any basis for getting into this as to the alternative source of income but I believe as we have discussed, I would be entitled to ask the defendant whether he has derived any income during the indictment years from placing bets on sporting events without being unduly prejudicial.

THE COURT: Mr. Murphy.

MR. MURPHY: If that is the basis, I think - -

THE COURT: There is nothing wrong - -

MR. MURPHY: I understand.

THE COURT: With a person wagering and wagering extensively. That is his private business although we do have here, and of course, the prosecutor can not ask questions like this out of the blue, but certainly we have a record here in which this kind of information is available to the Government and I think it would certainly tend to indicate whether or not Mr. Gay can give an answer, whatever the appropriate answer is.

MR. MURPHY: That's why I say, your Honor, but - -

THE COURT: But he can not ask him about arrests.

MR. MURPHY: All right.

THE COURT: You can not ask about arrests.

MR. MELLENGER: All right.

MR. MURPHY: But I would say - -

THE COURT: I think on that score, that you can not ask about, - put questions which indicate illegal activity. For example, you can not ask gambling activities. That sounds as if, you know, what is the next thing to arrest and I think that is not a proper way to put the question.

MR. MELLENGER: I understand that, your Honor.

MR. MURPHY: Yes, your Honor. I agree that if that is the type of question or if that is the question he tends to pose, but I suggest, your Honor, that it is a collateral issue and he is bound by the answer.

THE COURT: I do not know what the answer is going to be.

MR. MURPHY: I agree. I know that, your Honor, and I would appreciate that, but it still comes into the fact that we run into a collateral issue then on this area and how extensively he can cross once an answer has been given - -

THE COURT: He does know that on certain occasions that wagers, and I'm not going to say that there was anything illegal about it, wagers were taken by Mr. Gay on a particular day. You and I, we can make a wager one with the other and nothing is illegal about it and if the question is couched along those lines naming a particular person on a particular day I think that that is a proper question. If Mr. Gay says, "No, I did not obtain any money, any additional money from any kind of wagering activity", I think then he is entitled to ask about a particular instance as long as the question is cleansed of any criminal implication.

MR. MURPHY: Thank you, your Honor.

THE COURT: Shall we have the jury come up, please.

(Jury returns to the courtroom.)

SILVIO RUSSO (3 Briarhill Road, Orchard Park, New York), a witness called by and in behalf of the defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MURPHY:

Q Mr. Russo, what is your occupation, sir?

A I am president of South Park Electric Company.

Q And is that a corporation, sir?

A Yes, it is.

Q And what does it deal with?

A It deals in the electrical distribution business. We sell merchandise for the construction, residential and commercial markets.

Q All right. Now, have you received any formal education, Mr. Russo?

A Yes sir, I have.

Q And what education is that?

A I am a graduate of Canisius College in 1958 and a BBA in Business, major in accounting.

Q All right. Now, do you know Joseph Gay, sir?

A Yes sir, I do.

Q And are you any relation to Mr. Gay?

A I am his son-in-law.

Q All right. When did you marry Mr. Gay's daughter?

A Fifteen years ago tomorrow.

Q All right, and did there come a time, sir, after your marriage when you and your wife purchased a home?

A Yes, there was.

Q And can you tell us where that home was?

A. The home was at 20 Fieldcrest Court in West Seneca. It was built by one John Hyduck and my father-in-law helped us find the builder and the home.

Q. Now, did your father-in-law in any way assist you in the purchase of that home?

A. Yes, he did. In fact, it was upon his urging that we wound up buying a home.

Q. All right, and how did he assist you?

A. He financed the mortgage for the home. He was the mortgagee, - the mortgagor.

Q. All right. Now, do you recall the specific transaction itself?

A. Yes, I do.

Q. All right, and can you tell us about that, sir?

A. The specific transaction was that we met him at his house the day before we were to close and he handed me in a brown paper bag, a lunch type bag, $13,000 in cash.

Q. Now, did you eventually close the house or close the deal on the house?

A. The deal was closed and culminated the next day with the assistance of Crucian Messina who at that time gave us a mortgage that was signed over to my father-in-law.

Q. All right.

A. That mortgage also was never recorded, sir.

Q All right. Now, let me ask you this; did you utilize this cash, did you pay the cash the day of the closing?

A. No, I didn't, sir. The next morning I went to the bank and had a bank check, a bank draft made for it.

Q All right.

A. To be used at the closing.

Q All right.

A. It was much easier to carry that way.

Q Now, can you tell me this was in the year nineteen hundred and - -

A. 1961, '62.

Q In nineteen - -

A. My son was born in '63. It was in 1962, sir.

Q All right. Now, have you paid this money back to your father?

A. Yes.

Q All right. Was there any interest on this loan?

A. No sir, there was no interest involved whatsoever.

Q All right.

A. There was a stipulation in the mortgage that if I sold the house he would have to approve of the new owner accepting the mortgage and that there was a stipulated rate of interest in it and I believe it was at that time six per cent.

Q All right.

A. Which was the going rate.

Q. So if the house would have been sold and the buyer assumed that particular mortgage, he would have to approve it?

A. Yes.

Q. Is that it?

A. Yes. He would have to have approved that.

Q. Now, there was no interest charged to you, however?

A. No, there was not. I merely paid it every quarter. I paid him $250 every quarter.

Q. And was it eventually all paid off?

A. Yes.

Q. Now, how did you make these payments?

A. In the same way I received the money, in cash.

Q. Now, Mr. Russo, I call your attention then to the year 1967.

A. Yes.

Q. At that time, where were you employed?

A. With my father in South Park Electric.

Q. All right. What was the business makeup of South Park Electric Company at that time?

A. Well, at that particular time we were operating out of 2249 South Park Avenue. We had the one building. My father had just purchased a piece of property on the corner of Okell and South Park and we had property that was on each corner of the block and there was a donut in the middle and we talked about the property that someday we were going to own it and as we closed that property on Okell Street the day we closed it and came back from securing the building we were able to purchase the land in between which father had offered some 25 years previous.

Q All right. Now, again, was the structure a corporation at that time?

A Absolutely.

Q All right. Who was the president at that time?

A My father, Sebastian Russo.

Q All right. Now, did there come a time, - were you, incidentally, in the business and working with your father?

A Yes, sir.

Q Did there come a time in the year 1967 when you, or through your efforts, Mr. Gay and your father entered into a personal business transaction?

A Yes, they did.

Q All right, and can you tell us what that was?

A The transaction, if my memory is exact, occurred at our home, my wife and I's home. I believe it was Thanksgiving Day and it was either Thanksgiving Day or a birthday and my father and my father-in-law were talking and father was able to purchase this one piece of property but didn't have the funds and they were talking about it and my father-in-law offered to my father a loan of $20,000.

Q All right. Now, to your personal knowledge, did that loan then go through in that year?

A. Yes, it did.

Q All right. Now, tell me what you know about the loan itself.

A. Okay, about the loan, my father-in-law brought to my dad the $20,000 that he agreed to give him, in cash and my father accepted it and as security to my father-in-law, he insisted that his Attorney, John LaDuca draw up a document to evidence such a note. John drew that up for my dad and in so drawing it up he gave him a collatera mortgage that would protect my father-in-law in case something ever happened to my dad and they would both know it and it would be a matter of record. That mortgage to my knowledge, had never been recorded anywhere because in 1968, when we turned around and incorporated, my dad's personal holdings, there were no records at County Court, at the County Clerk's Office, that indicated that this mortgage even existed. He turned around and satisfied it with his own personal holdings in the property in Angola and the house that he lived in.

Q All right. Now, was that loan, to your knowledge, eventually paid off?

A. Yes, it was.

Q In what period of time?

A. I am certain that it was paid off in a year or two, maximum of two. It may have been closer to eighteen months. I am not exactly positive. I believe my father paid him at a rate of $5,000 every six months.

Q All right. Now, from your knowledge, incidentally, you indicated that Mr. Gay brought to your father, twenty thousand in cash, is that correct?

A. Yes.

Q Now, did you at any time, handle that cash?

A. Yes, sir. I took it down to the bank to deposit it in my father's checking account so at the closing he would have the cash available.

Q All right, and you took the twenty thousand to the bank and deposited it?

A. Yes, I did. He used the Liberty Bank on South Park Avenue at that time.

Q Tell me, sir, was that an interest bearing loan?

A. To the best of my knowledge, it was not.

Q All right. Now I call your attention then to the year 1969. Did something occur with respect to your father-in-law in that year that stands out in your memory?

A. Yes.

Q. And what was that?

A. Before Christmas there was a burglary at his house, a break in. Not a burglary. They actually held him up in his house.

Q. So two individuals came in and held up your father-in-law?

A. Yes.

Q. That would be a robbery as opposed to a burglary?

MR. MELLENGER: Your Honor, I am going to object unless this witness has personal knowledge of these transactions.

MR. MURPHY: All right.

MR. MELLENGER: There has been no basis stated, nothing stated as to what basis of these transactions is, unless he has personal information.

THE COURT: I will sustain it.

THE WITNESS: What transactions are you talking about?

THE COURT: You listen, Mr. Russo, to Mr. Murphy's question.

THE WITNESS: Okay.

MR. MURPHY: May I be heard, your Honor?

THE COURT: Surely. Why don't you and Mr. Knisley and Mr. Mellenger come over to the side?

(Sidebar conference held between Court and Counsel as follows:

MR. MURPHY: The only thing is, your Honor, with respect to this, I am not offering it for the truth of the matter. It is in the case. It was told to the Agent. They have been given credit for insurance proceeds as a result. The only reason I got into robbery as opposed to burglary is he used "burglary", and I wanted the record correct.

MR. MELLENGER: The only thing is, was Mr. Russo there?

MR. MURPHY: He knew of the robbery.

MR. MELLENGER: I have no objection to that.

MR. MURPHY: He had heard it was a robbery.

MR. MELLENGER: Are you going into something after that on the robbery?

MR. MURPHY: I will go on to something he has personal knowledge of.

MR. MELLENGER: All right.

THE COURT: All right.

(Sidebar conference concluded.)

BY MR. MURPHY:

Q Mr. Russo, in 1969, you heard that there was a robbery where some people come in and held up your father-in-law and mother-in-law, is that right?

A. Yes. It was also in the papers, sir.

Q All right. Now, following that, did there occur something, did something occur between you and your father-in-law?

A. Naturally after we heard about this, we went over to visit them, my wife and myself to find out how they were. Everything was okay, - within a day or two afterwards. At that time my father-in-law took me into the basement and he was talking to me and he showed me where they punched a hole through the wall, one particular individual who was in the robbery, and he turned around and he told me the story of how they kept demanding where the safe was and he never had a safe in the house. He just didn't have a safe and he turned around and he says, "The best part of it is", he says, "they never got the big one", and he showed me a little box and in that box was cash and looking at it and seeing it there was over $110,000 in that box at that time.

Q All right.

A. That was not handed over to these robbers.

Q Now, did there come a time, sir, following this, when your father-in-law went to work for you?

A. He went to work for us and he went on a trip.

Q. Well, please. Did he go to work for you?

A. Yes.

Q. When?

A. 1970, about March.

Q. March of 1970?

A. Yes.

Q. And he was employed by South Park Electric?

A. Yes, he was.

Q. In what capacity?

A. He was in the capacity of a salesman.

Q. What was his salary as a salesman?

A. I believe he was paid at that time around ten or twelve thousand dollars a year.

Q. A year, all right, and did there come a time again in the year 1970, when you had occasion to see this box, that you described, again?

A. Yes, I did. He took a trip with my mother-in-law and I believe it was Spain. I'm quite certain it was and he gave me the little box and in it was cash. He said, "Take care of it while I am gone". At that time I counted it, that there were $40,000 in the thing at that time.

Q. All right. Now, has your father-in-law continued to work for you?

A. Yes, he still is in my employ.

Q. And does he have any stock in the corporation?

A. Yes, he does.

Q. All right. Is he an officer of the corporation?

A. Yes, he is.

Q. And what office does he hold?

A. Naturally he is treasurer.

Q. Pardon?

A. Treasurer.

MR. MURPHY: Treasurer. You may ask.

CROSS EXAMINATION BY MR. MELLENGER:

Q. Mr. Russo, how much of an investment does your father-in-law have in South Park Electric?

A. He owns 166 shares of stock in the corporation, sir.

Q. And how much cash did he invest in that corporation to purchase that stock?

A. $80,000.

Q. When was that?

A. 1973. It was not cash, sir.

Q. It was not cash?

A. No, sir.

Q. What form was that?

A. It was in the form of, - if I get the name right or remember it right, Intermediate, - Federal Intermediate

Farm Bureau Credit Bonds, and I believe that is the right name.

Q How about Federal Intermediate Bank Bonds?

A. Yes.

Q All right.

A. Could it be Federal Rand Bonds or something like that?

THE COURT: Something like that.

MR. MELLENGER: Something like that.

THE COURT: Federal Bonds.

THE WITNESS: Federal Bonds.

BY MR. MELLENGER:

Q There has been testimony about Federal Intermediate Credit Bank Bonds?

A. I had to take these to the Federal Reserve Bank to cash them, sir.

Q You did?

A. Yes.

Q Did he endorse them over to you?

A. There was no endorsement required, sir.

Q They were what is called or what is known as bearer bonds?

A. Yes, sir.

Q So whoever had possession of these could cash them?

A. Yes, sir.

Q Where did he give you these bonds?

A. When or where?

Q Where?

A. At the company, sir.

Q At the company, South Park [illegible]?

A. Yes, sir.

Q Do you remember the date?

A. It was the beginning of February, 1973.

Q Now, you took these down to the Federal Reserve Bank and cashed them?

A. No, I did not, sir, not at that time. They were due on March 1st and he had given them to me. I had taken them and put them in my safe deposit box until such time as they were cashable and at that time it was the 2nd of March that I took them to the Federal Reserve Bank. It was a Friday and I cashed them. I took them in to Federal Reserve and they gave me a check for it made out to the company, South Park Electric.

Q Do you know what a coupon bond is?

A. Yes, sir.

Q Okay. Did these have any coupons attached to them?

A. No sir, they did not. They were cut off already.

Q Now, you testified that your father-in-law, the defendant Mr. Gay, had granted you a mortgage for the purchase of your home?

A. Yes, sir.

Q. And that he gave you $13,000?

A. Yes, sir.

Q. You said this was in cash?

A. Yes, sir.

Q. In a brown paper bag?

A. Well, it was - -

Q. If I am wrong, correct me.

A. It was placed in a brown paper bag and he handed it to me and took it out of the bag and gave it to me.

Q. Was there any other money in that bag?

A. No, sir.

Q. What date did he give you this money?

A. The exact date escapes me, sir. I would have to look at the deed record and I could tell you from that because it was the day prior.

Q. Approximately the month and year, if you can?

A. The home was entered into, - the deal started on December 5th.

Q. Of what year?

A. Of 1962, the year before my son was born. The property was closed after that. I think within a month. I believe we moved in October.

Q. So in any event it would be the fall of 1962?

A. Yes. Yes, it was the fall.

Q. And where did he give you this money?

A. At his home.

Q. Okay. Where in the home?

A. In the living room.

Q. And to the best of your recollection, what was said at that time, what did you say to him and what did he say to you?

A. There was some comment made about the cash and he says, "That's all $13,000 is", and he had it in his hand and it was a rather small amount.

Q. He said this or you said this?

A. He says "That's all $13,000 is". He says, "There is your house" or something to that effect. I'm not positive of the exact words. It is quite a few years ago and I commented about the cash.

Q. About the what?

A. The amount of cash.

Q. And what was your comment about the amount of cash?

A. I said something to the effect of having it around or, it is vague, sir.

Q. To the best of your recollection.

A. Something about the amount of cash that was there and its denominations.

Q. What denominations was it in?

A. Fifties and hundreds.

Q. And you thought it was kind of strange that he would have this amount of cash around?

A. Yes sir, I did.

Q. And did you ask him about this at that time?

A. You got to remember I was only a member of the family for a short time so I didn't question too much.

Q. I can understand.

A. I didn't at the time.

Q. What did you do with this cash after you received it?

A. Well, Number 1, I had to keep it overnight because he gave it to us after dinner.

Q. After dinner. Did there come a time when you deposited this cash?

A. I had to take this to a bank in the morning before we closed. I took it to the bank and had them give me a bank draft for it. I felt much more comfortable with that.

Q. You didn't like carrying around $13,000 in cash?

A. No.

Q. You testified also that you - -

MR. MURPHY: I'm sorry, your Honor. Did you say fifteen or thirteen thousand?

MR. MELLENGER: Thirteen thousand.

MR. MURPHY: Okay.

BY MR. MELLENGER:

Q You have testified that over the years you have been making payments back to your father-in-law for this loan?

A Yes.

Q What were the amounts of those payments?

A $250.

Q And at what interval do you make these payments?

A They were made every three months, sir.

Q And were the payments made in the years 1967 through 1971?

A No, sir. It was paid up in '71.

Q It was paid up in '71?

A They were paid up until that time.

Q What do you mean they were paid up?

A Well, I have since sold that house. You will note that my residence is not that address.

Q Okay. When did you sell that house?

A In 1971.

Q Okay. Now, between the years 1967 and 1971, did you make any payment on that loan?

A Yes.

Q Every quarter?

A Yes.

Q Were you paying any interest?

A. No, sir.

Q. Sir, what is your affiliation with South Park Electric?

A. I am now the president. I originally was the son of the owner.

Q. Okay. How long have you been president?

A. Since my father passed away, January 4, 1974.

Q. And before president, what was your position?

A. What was my position?

Q. Yes, with South Park Electric?

A. I was the vice-president.

Q. How long were you vice-president?

A. Father made me vice-president when? About eight or nine years. No, not, - around 1965, somewhere around there.

Q. So during 1967 and 1971 you were vice-president of South Park Electric?

A. Yes.

Q. And I believe Mr. Murphy asked you about your education?

A. Yes, sir.

Q. Okay, and you stated, if I remember correctly, that you are a graduate of Canisius College?

A. Yes sir, 1958.

Q. And what is your degree in?

A. Bachelor of Business Administration, Major in Accounting.

Q. Major in accounting. Now, as a business man do you normally conduct your affairs by paying cash for things rather than check?

A. Our business affairs are conducted normally by checks by disbursement. We do handle cash.

Q. Why did you choose to pay back this mortgage in the form of cash to your father-in-law?

A. That is the form in which he gave it to me. That is the form in which I paid it back.

Q. Did he ever ask you to make that repayment in the form of cash?

A. No, he did not.

Q. Now, you had testified to a transaction involving the defendant and your own father, is that correct?

THE COURT: Mr. Russo, you purchased this house in about 1961 or '62?

THE WITNESS: Yes, sir.

THE COURT: This was in West Seneca?

THE WITNESS: Yes, sir.

THE COURT: And then you lived there for how long?

THE WITNESS: Nine years.

THE COURT: And you paid back, as you recall, about $1,000 each year?

THE WITNESS: Yes, sir.

THE COURT: Then you purchased another house in

Orchard Park?

THE WITNESS: Yes, sir.

THE COURT: When you purchased the house in Orchard Park, what happened to the mortgage on the house in West Seneca?

THE WITNESS: The people who were buying the home secured their own financing, sir.

THE COURT: All right, and what did you do then as far as - -

THE WITNESS: I paid off the balance.

THE COURT: You paid it all off at one time?

THE WITNESS: Yes.

THE COURT: When you received the funds from the people who bought the West Seneca house?

THE WITNESS: Yes.

THE COURT: What did you do as far as financing the Orchard Park house?

THE WITNESS: The Orchard Park house was financed with the proceeds from the West Seneca sale, from funds advanced to me by my father and funds that I borrowed from my life insurance policies.

THE COURT: On your life insurance, all right. Was there any renewal of any mortgage loan from your father-in-law at that time?

THE WITNESS: No, there was not.

THE COURT: When was this purchase?

THE WITNESS: 1971, August.

THE COURT: All right.

THE WITNESS: August 13th.

THE COURT: Go ahead, Mr. Mellenger.

BY MR. MELLENGER:

Q Thank you, your Honor. So when your house was sold in 1971 you repaid back the outstanding balance of the mortgage?

A. Yes.

Q And what was the outstanding balance of the mortgage at that time?

A. About $4,000 and change.

Q Did you pay your father-in-law back by cash?

A. Yes.

Q Or check?

A. Yes, I did.

Q Cash or check?

A. Cash.

Q Cash. You had testified on direct examination about a time, Thanksgiving, I believe, when you and your father-in-law and your father were present or together at one point?

A. Thanksgiving dinner was normally held at our home and has been a tradition since the wife and I have been married and at that time is the time I believe the transaction occurred. I am not positive that that was the exact date but I believe it was the date where it was begun.

Q What year was that?

A. That would have to have been 1966 or '67. I believe it was '67.

Q It was 1967?

A. Yes.

Q And your father had stated something to the defendant about purchasing some property?

A. Yes, a piece of property at what would be known as 2231 South Park Avenue. It is a piece of property 120 x 120.

Q And what did the defendant say at that time about purchasing that property?

A. My dad was talking about, - I was a little aside from the conversation and I don't know how they got on to the subject or how it started. We had talked about buying a piece of property and he had been able to buy it and we always refer to it as the hole in the donut. You have to appreciate how this property is laid out.

There is a piece of property on Marilla Street which was 39 feet by 120. My parents lived in the home immediately behind that on Marilla Street and my mother still does and we bought the property on the other corner of Okell which was 79 or 80 feet by 170 and that gave us a nice large "U" and we were intending to expand the corporation operations at the time and we had always talked about the hole in the middle and we joked about it and my dad says, "Maybe I won't, but someday you will buy it and you will buy it at your price" and the day we secured the property and were walking back from the one corner to the present building and we met the owner who had the property and he offered to sell it to us at the price he paid for it.

Q. That was before the Thanksgiving meeting?

A. Yes, and at that meeting - -

THE COURT: There is not a question before you, Mr. Russo. Question, please, Mr. Mellenger.

BY MR. MELLENGER:

Q. In any event, you had an opportunity to buy this property, or your father?

A. My father did.

Q. And for what amount?

A. $22,500.

Q. Okay, and did he have this money to purchase this property?

A. Not at that moment.

Q. And did he acquire this money to purchase this property?

A. Yes, he did.

Q. And where did he acquire it?

A. From my father-in-law. He acquired $20,000 of it.

Q. And he had to come up with the remaining two thousand five hundred?

A. Yes, he did.

Q. Do you know when he acquired this money?

A. It was sometime before the closing, the close of it. Now, the exact time escapes me. It was winter time. It was cold, colder, the fall.

Q. Would it have been before or after the first of the year, January 1, 1968?

A. Oh, it was definitely before 1968, sir.

Q. It was before 1968?

A. Yes, it was, because we started construction on the property that December so it had to be sometime before that we had to own it. That is a good way to tie it down.

Q. Were you present when your father acquired the money from Mr. Gay?

A. Yes.

Q. And do you know approximately when that was?

A. I believe it was a Tuesday. Don't ask me why I remember a Tuesday. I can't tell you the exact date.

Q. Well, where did he acquire the money from Mr. Gay?

A. My father-in-law came to my dad's office at South Park Electric. It was during the day and handed him the $20,000.

Q. Was this in the form of cash or check?

A. Cash.

Q. And were any instruments signed at that time?

A. No, there was not. My father insisted upon one being drawn up at that time and he made a phone call to the attorney to have it done.

Q. Okay, and are you aware of any instruments ever being signed by your father?

A. Yes, there was one tendered and being the executor of the estate I did see that instrument and knew it had been returned. This was the original copy of it he had signed that had been returned and it was just one of the papers I disposed of in trying to clean up his affairs.

Q. Do you know whether this instrument was ever filed with the Erie County Clerk's Office?

A. I definitely know it had not been because when we went to incorporate my father held all property personally up until that time and we incorporated in 1968, February. All the properties were converted from him personally to the corporation which was founded and called R & R Enterprises and at that time these things had to be ironed out and the search for the deeds and everything else was brought up to date and there were no liens against it.

Q Okay. Now, are you aware of this loan having been paid back to Mr. Gay?

A. Yes, I was aware that my father mentioned, "I have to go see your father-in-law and pay him some money".

Q. Okay, and when was this?

A. Several times he mentioned it. He said, "I got to see your father-in-law", and he went over, - I believe he went to his home.

Q Do you know whether he paid this back in a lump sum or in periodic payments?

A. I know specifically of two payments, one in the end of June and one in December.

Q Of what year?

A. I believe the first one was in 1968 and the second was December of 1968. Those are the two specifically I know of.

Q Do you know in what amount?

A. $5,000.

Q. So these were paid back, - were all the installments paid back in amounts of $5,000?

A. I am not sure whether the second one was paid back in a larger amount or whether he paid the third one, - the third one was a complete payment of $10,000 or whether he paid him in $5,000 increments.

Q. Do you know whether this loan was repaid in the form of cash or check?

A. I am not positive. I wouldn't be a bit surprised if it was paid in either. I would have to check my father's cancelled checks that I have.

Q. You have no personal knowledge of what form it was paid back?

A. Not exactly, sir, none that I know directly of.

Q. Do you know if this loan was paid back in full prior to December 31, 1971?

A. Yes.

Q. It was, but you don't know when the subsequent payments were made?

A. I don't know about the other ones.

Q. Do you know if Mr. Gay charged your father any interest on this loan?

A. I don't recall anything about interest ever being mentioned or talked about. I believe my father did offer it. I am not sure whether there was interest paid. I don't think there was any.

Q. Was this a personal loan of your father's or of the corporation?

A. Of my father's. I said all property was held personally. It would have had to have been personal. If it was corporate I would have known more about it.

Q. You took this down and deposited it in your father's bank account for him?

A. Yes, again at the Liberty Bank on South Park Avenue.

Q. Now, you had testified that your father-in-law, - about your father-in-law informing you of a robbery at his home in 1969?

A. Yes.

Q. And you went to visit him after that robbery, is that correct?

A. Yes, we did.

Q. And you said he showed you a strong box?

A. Not a strong box. Just a tin box.

Q. A tin box. What color was that box?

A. Grey.

Q. And what was the size of that box?

A. About the size of a shoe box, maybe a bit larger.

Q. Could you estimate the size in inches?

A. About 12 by 8 by about 5 or 6 inches deep, 4 inches deep.

Q. You said he had $110,000 in that box?

A. Yes, sir.

Q. And how do you know he had $110,000 in that box?

A. Well, he showed me a stack of $5,000 bills which I handled and there were 22 of them there.

Q. Twenty-two of them, and what denominations were these bills in?

A. Fifties and hundreds.

Q. Fifties and hundreds?

A. I never saw that much money at one time.

Q. Did you make any comment to your father-in-law about having that much money on hand?

A. Yes. I asked him if he was crazy keeping that much around.

Q. And what did he say to that?

A. Nothing. I don't remember. I just thought he was nuts.

Q. As a business man you would never keep that much money around, is that correct?

A. Not that way, sir.

Q. And you had testified you had again seen that same tin box in 1970, is that correct?

A. Yes, sir, I did.

Q. And you testified that at that point there was $40,000 in the box?

A. Yes.

Q How did you know there was $40,000 in the box?

A Because I took it out of the box and put it in my safe deposit box while he was away.

Q He was on vacation.

A Yes, sir.

Q Where did he go on vacation?

A I believe it was Spain.

Q And how long was he gone?

A Two weeks.

Q Two weeks?

A Yes, sir.

Q Did you know him to take vacations very often?

A Not excessively often but he went to Bermuda one time. He went to Spain another time. He went to, - oh, Aruba, I think the island is.

Q Did he ask you to take charge of this tin box and the money in there at that time?

A No, he didn't. This was the only time he did.

Q Okay.

A And I made a comment of "what happened to the rest of it" and he said he had been investing.

Q Did you say he took a vacation every year?

A There was a period of time when the Clinton Business Men's Association was running excursions that were fantastic deals as far as cost went and he went mostly with them.

Q. At the - -

A. Yes.

Q. At the time he gave you this $40,000 in the tin box how did this come about, what did he say to you about this?

A. He was a little upset with the burglary or a robbery that had occurred and that he had asked me to take care of it in case they decided to try and come back.

Q. Did he tell you whether he had any other money in the house?

A. Not at that time.

Q. And where did this take place where he gave you this money, what part of the house?

A. It was at work, sir.

Q. That is where he gave it to you?

A. When he came to work one day he brought it with him.

Q. Did he ever tell you about any money he may have had in the attic?

A. Yes sir, he did.

Q. He did. What did he say about the attic?

A. There was one time he went away and he had mentioned to my wife and myself that we should look around the house, take care of it while he was away, to check it and something about if anything happens, he says, "Look around. There are places where there is a lot of money".

Q Now, on this particular occasion when he gave you the $40,000 do you remember when that was, what date?

A. I believe it was October, sir.

Q October of 1970?

A. I believe that's right.

Q At this point did Mr. Gay tell you anything about bonds, he had any bonds?

A. No, sir.

Q Did he tell you about any stock certificates?

A. No, sir.

Q On the prior occasion you said when he was going on vacation he said if anything happens look around, you will find a lot of money. Did he tell you you would find anything else if you looked around?

A. No, just papers that were around the house. I knew that.

Q Did he say you would find any stock certificates?

A. No, not specifically stocks.

Q Did he say you would find any bonds?

A. Not specifically, sir.

Q Do you know whether or not your father-in-law had a safe deposit box?

A. No.

MR. MELLENGER: May I have one minute, your Honor?

THE COURT: All right.

BY MR. MELLENGER:

Q I would ask you whether you knew if your father-in-law had a safe deposit box and you said no, no you don't know or no he didn't have one?

A No, I didn't know whether he had one at the time.

Q Do you know anything about your father-in-law's investments in securities?

A At what time, sir? Today?

Q During the years 1967 through 1971?

A No, I didn't know that much about them. I knew he had some stocks. I knew he had boughten some stocks in that period of time. He mentioned a few different names.

Q Now, this money which he had in the tin box, did you ever ask him where he got it?

A No.

Q And you see $10,000 sitting in a tin box and you didn't ask your father-in-law where this money came from?

A I don't think it is a son's place to ask his father too much.

THE COURT: The question is, Mr. Russo, did you?

THE WITNESS: No, I didn't, sir.

BY MR. MELLENGER:

Q About the $80,000 investment in the Federal Intermediate Credit Bank Bonds, did you ask him about the investments in those bonds?

A. No, I didn't, sir.

MR. MELLENGER: I have no further questions, your Honor.

THE COURT: Mr. Murphy;

MR. MURPHY: None, your Honor. That is all. Thank you.

THE COURT: Thank you, Mr. Russo.

THE WITNESS: Thank you, sir.

THE COURT: We will take a brief recess now and then be back in a few minutes and continue the testimony.

(Recess taken at 3:35 p.m.)

* * * * * * * * * *

PROCEEDINGS: After recess, 3:40 p.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury present.)

THE COURT: All right, Mr. Murphy.

MR. MURPHY: Mr. Gay, please.

JOSEPH GAY (3 Fredro Street, Buffalo, New York), the defendant herein, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. MURPHY:

Q Mr. Gay, how old are you, sir?

A Sixty-two.

Q And where were you born, sir?

A Buffalo, New York.

Q Now, can you tell me, sir, what your education consists of?

A I was graduated from eight grades of grammar school.

Q And what school was that?

A School 69.

Q All right. How old were you when you graduated from school?

A. Thirteen, thirteen.

Q. Following your graduation from 8th grade, what did you do, sir?

A. Well, immediately that summer I found a job in a printing shop downtown. I was like a delivery boy and apprentice around the shop.

Q. All right, and what shop was that?

A. It was a George Fisher Printing.

Q. Now, how long did you continue to work for Mr. Fisher?

A. Through the 30's, maybe '33 or so.

Q. All right, and then what did you do at that time?

A. Well, in the meantime, I learned quite a bit about printing. I bought a printing press and type and that and I started printing on my own.

Q. How old were you at that time?

A. About seventeen, eighteen.

Q. And you bought your own printing press?

A. Yes.

Q. And started printing?

A. Yes.

Q. All right. Now, how long did you continue to be a printer?

A. Well, I have always been a printer. I still print right now.

Q All right, and do you still own a printing press?

A Yes.

Q And where do you keep it?

A At home, in my basement.

Q You still do odd jobs printing?

A I still do odd jobs.

Q All right. Now, did there come a time when you acquired a tavern?

A Yes. My wife's mother was in the tavern business and they also had a grocery and meat market previous to that and then around the years of '39 or so, she had told me that there was a tavern for sale and why don't I look into it, so I did. I checked it and I told her that, "Yes, it is for sale, but I don't have enough finance to swing it", so she offered to loan me $15,000 to swing the deal.

Q All right. Did you have some of your own money?

A I had not too much.

Q But you utilized her fifteen thousand and some of yours?

A Yes.

Q And what was the name of this tavern?

A Well, when I got it, I named it Gay's Grill.

Q Gay's Grill, and where was it located, sir?

A On Perry and Red Jacket Street in Buffalo.

Q And did you purchase the building?

A. No, no. I just purchased the tavern business, the fixtures and tables and inventory and so forth.

Q. All right. Now, is that building in existence today, sir?

A. It is still standing, but I think it is empty.

Q. All right. Now, how long did you stay in the tavern business?

A. Oh, almost two years.

Q. Almost two years?

A. Yes.

Q. And you sold it?

A. I sold it.

Q. All right, and that would take us up to what year?

A. Oh, about '41, '40, '41, in that period.

Q. Now, Mr. Gay, when you were in the tavern business, did you still continue to do printing?

A. Yes.

Q. Following the tavern business, - did you sell that business?

A. Yes, I did.

Q. And when you were all finished with that business - -

A. Yes.

Q. Had you accumulated at that time substantial amount of money?

A. When I got through with the tavern business, I had about $65,000.

Q About sixty-five thousand?

A. Yes.

Q Was a portion of that your mother-in-law's?

A. Yes.

Q And did you give it back to her?

A. No. I offered her the fifteen that she gave me, but she said, "No, hold onto it. You will probably find a little better place or something and start a different place or something", so I did, but in the meantime, the war broke out and I went to work in different defense plants.

Q All right.

A. '42, I believe, I worked at Chevrolet.

Q Now, that would be Chevrolet where, sir?

A. On Kenmore Avenue. They were making airplane motors.

Q And where else?

A. '43 I was at Bell Aircraft.

Q And how long did you stay at Bell?

A. About a year and then my brothers and my father both, - all worked on the Erie Railroad and there was a shortage of switchmen there, so my brother says to me, "Why don't you come to work there as a switchman", so '44 I went there and I got hired as a switchman.

Q And that would be the Erie Railroad?

A. Erie Railroad.

Q. Again, did you continue your printing?

A. On the side, I did as much as I could, yes.

Q. Did there come a time when you got married?

A. Well, I got married in '36.

Q. All right, and who did you marry?

A. Well, I married Miss Stella Kosowski.

Q. And she is in the courtroom here?

A. Yes.

Q. All right. Now, you had two daughters, is that correct?

A. We had two daughters.

Q. And that is the only children you had?

A. That's the only children we had.

Q. Now, following your working on the Erie Railroad, - how long did you work for them?

A. Until the war ended and then around '47, I started working as a liquor salesman.

Q. For whom?

A. For Universal Liquor in Buffalo, New York.

Q. Now, this $65,000 that you spoke of following the coming out of the tavern business, what did you do with that, Mr. Gay, during the war years?

A. I just kept it. I just kept it cash on hand. I always figured, you know, get into some business or use it for investments or whatever, and in those years, there was no interest or anything much in the bank. They paid maybe two per cent or two and a half per cent and during the 30's there used to be the bank failures. There was a bank holiday declared by President Roosevelt at one time where banks were closed for five days and I was a little skeptical too.

Q. All right. Now, did you make any investments or any loans where you put that money to work for you?

A. Well, whenever I had a chance, if somebody needed like a little mortgage or something, I would do so.

Q. All right, and you would charge the legal rate of interest?

A. Yes.

Q. All right. Now, you say then you became a liquor salesman?

A. Liquor salesman.

Q. And how long were you a liquor salesman?

A. Into the 50's.

Q. How long into the 50's?

A. Oh, about six or seven years.

Q. Well, that would take us up to 1951?

A. Maybe '3, - that period, 1953.

Q. Now, Mr. Gay, did your cash increase above this

$65,000?

A. Well, in the meantime, from my earnings, whatever I could save and from the little side printing, whatever I saved I kept adding to it.

Q. All right, and then in the 50's, sir, what did you start to do then after being a liquor salesman?

A. The reason I quit the liquor business because I start feeling bad and I seen my doctor and he says to me, "What kind of a job do you do", and I told him, "I sell whiskey", and he says, "Do you drink on the job", and I says, "Yes. When you go into taverns and you try to promote business, you usually buy the proprietor a drink. You usually have one with him and during the course of a day," I says, "you have quite a few", so he says, "Well, that's why you don't feel good". He says, "Find a different, some other kind of work", so I gave up that job and then I just put my time into printing and investments.

Q. All right. Now, you have made some mortgages over the years, have you?

A. Considerable, quite a few mortgages.

Q. And you charged interest on them, is that correct?

A. Yes, yes.

Q. All right. Now then, coming to the years in question, incidentally, did you lend your brother any money, -

your brother?

A. No.

Q No. Your one brother, when he bought his house, did you lend him some money?

A. Yes, when he bought the house. That was 1956. He worked at Buffalo Savings Bank and he showed me a schedule that the bank had given him where he would have to pay so much for thirty years and he says if I could loan him the money, he would pay me on that schedule, so I says, "All right", and so that would save him maybe $400 in searches and closing costs and so forth, so I said, "All right, I will do that", and I took and I gave him the money and he started paying me according to the schedule that the bank had given him.

Q Now, we have heard testimony, Mr. Gay, about this cash being in fifties and hundreds. Is that how you saved the money?

A. That was my habit. I always saved fifties and hundreds.

Q Until they reached what denomination, - it was kept in packs?

A. When I had a five thousand, I would wrap it up and make it a pack.

Q Before you had the five thousand, you wouldn't make it a pack?

A. No.

Q. All right. Now then, we take us into the 60's. What did you do during the 60's other than printing?

A. Just printing and investing, that's all.

Q. All right. Now, through the years '67, '68, '69, you invested, - you started investing, did you?

A. Do you mean in stocks or what?

Q. Stocks.

A. Yes, I started buying stocks and whatever. In other words, I was always interested in stocks because when I worked in the printing shop, it was 1929 and that was when the original crash came and my boss happened to be in that, so I had a little knowledge, you know, of what happened in '29 and then later on in the 40's and early 50's the market was booming again, it was going up so then I decided whenever I seen something that looked logical, I would invest in some stocks.

Q. Now, there came the year 1969. Did there occur, during the month of December and specifically December 17th of that year when you were robbed?

A. Yes, yes. Three masked men, one rang the bell and I answered it. I didn't see anybody and like a fool I opened the door to look out and he was just there on the side and the next thing I knew, there was three of them in the house.

Q. Now, Mr.Gay, in the year 1969, if you follow the Government's expenditures in excess of funds and if you look to the back here, you will see 159-3 Exhibit in evidence. According to the Government, there was $50,000 expenditures in excess of funds or $63,000 plus the thirteen that they say you declared. Were you making rather large investments in '69, sir; is that when it really started?

A. Yes. '69 and '70 was my biggest investments.

Q. All right. Now, in order to make these investments, where were you getting the money from?

A. From the savings that I had accumulated.

Q. All right. Now, were you, at any time, carrying large sums of cash?

A. On my person?

Q. Yes.

A. Yes, a couple thousand dollars, yes.

Q. All right, and in order to make these investments and buy these - -

A. Well, whenever I was going to make an investment, then I took whatever amount I needed.

Q. I see, all right, and you would then have these large amounts of cash, is that right?

A. Like a stock investment, I would take so much to the bank and have a bank draft made and pay for the stock in that way.

Q. Now, Mr. Gay, did you ever, during that year, flash any of this money? By that, I mean did anybody ever see you with those large sums of money?

A. Well, I mean I had given quite a few people mortgages and I guess it was common knowledge that I gave out quite a few mortgages.

Q. In cash?

A. In cash.

Q. All right. Now, following this robbery, did there come a time when you showed your son-in-law this money?

A. Yes. He visited me about a couple days later to find out how everything was and I told him that we were all shaken up and I told him that they didn't get whatever they came after, the large sum that I had put away and I showed it to him and I says, "They asked me the wrong question", because I got hit about three different times and they said, "Where is the safe, where is the safe, where is the safe", and I always told them, "There is no safe in this house. There has never been a safe in this house".

Q. Now, Mr. Gay, why didn't you give them all of the money?

A. Why didn't I give them all the money? I had about $900 in my coat pocket upstairs and I had about $300 where my printing press was so they asked for money and

I says, "It's up there in the coat", and I says, "There's some in the printing, that's all I got".

Q All right. Now, did they also rob your wife? Was your wife there when you were robbed?

A. She was there and she got robbed once.

Q Did they get any of her money?

A. No. They just took her fur coat. She had money of her own put away not in the mattress but in a woman's purse in her own bedroom that she was saving from moneys that I was giving her.

Q All right.

A. And she had it behind the dresser there somewhere and they never found it, so when the thing was over, she ran over there first of all and she found the money and she says, "Phew, they didn't find the money, it is still there", so I counted the money and I seen how much she had so that's when I said, "I am going to buy you a Government Bond, Treasury Bond."

Q All right. Now, you slept in the same bed as your wife, is that correct?

A. Not always. Right now we sleep in separate bedrooms.

Q Back in those days?

A. I don't recall.

Q Did you ever notice any money in a mattress?

A. We never had no money in a mattress.

Q. Now, in the year 1970, you also made some rather large investments?

A. Yes, because when the robbery happened, I said, "I'm not going to hold any kind of cash like that on hand no more", so then I started looking for tax exempts. My income was already going up every year. I was getting into the twenty-five per cent bracket and I says, "I got to put some money in tax exempts and bonds of that nature", so I started investing a lot of that money in those kind of securities.

Q. Now, did there come a time, Mr. Gay, when you took some trips with your wife?

A. Yes. The Clinton businessmen usually sponsored a trip. For five years, they had a trip, one every year and I believe the first one was in '67. It was to Bermuda and it was a reasonable figure so the wife and me took that trip.

Q. All right.

A. So whenever I would leave, I would call my daughters and I would say, "Now, look, we are flying and you never know. You hear of airplane crashes". I said, "Something could happen. If there is such a thing that anything should happen, look here and here", and I would tell them where to look to find whatever moneys or securities I have.

Q All right. Now, where did you primarily keep this money in your home?

A. Well, I had a space in the attic. It was like a crawl space. I used to keep it there most of the time. The only way you can get there is through the ceiling and I figured they wouldn't figure to look there.

Q All right. Now, where in the crawl space did you keep it?

A. It was in the attic like under, - what do you call it, to keep the heat up there.

Q Insulation.

A. Insulation, under some insulation.

Q In a space under insulation?

A. Right.

Q Now, then we go into 1971. You also made some investments there. Incidentally, when you went away, did you go away in 1970?

A. Yes. 1970 we went to Spain.

Q All right, and when in 1970?

A. That was in October.

Q All right. You had made some rather large purchases in '70 in April that we heard of and in September?

A. In April I bought the Federal Intermediate Bonds, eighty thousand. That's the bonds I invested in South Park Electric in 1973.

Q All right.

A And in November, - not November, - in September I bought the tax exempt bonds like New York City, Albany, New York tax exempts, whatever they were, State of New York.

Q All right. Now, you then became the subject of an investigation by the Internal Revenue Service?

A That happened in '71, a week before Christmas in '71.

Q All right, and who was the first IRS Agent that you met?

A A Mr. Krysztof.

Q And where did you meet him, sir?

A Well, he met me at the Park Lounge on Clinton and Spann Street.

Q And where did you go from there?

A Well, he introduced himself. He says, "Is there someplace we could go and talk", so I says, "All right". I took him to my home. I took him down in the basement where I got my printing and that's where we had our first interview.

Q All right. Now, did he ask you about cash on hand at that time?

A Yes, and I says I couldn't give him any idea because of checks and mortgage payments and so forth and I just didn't know at that time.

Q All right. Now, you did tell him at that time you could give him no idea, is that correct?

A. No idea at that time, yes.

Q Now, following that, did you provide some records for him?

A. Whatever he asked for. He asked for my checks. I supplied them. He asked for my printing book. I gave it to him and any records he asked for, I supplied them.

Q Did there come a time when he asked for records of mortgages?

A. Yes. I gave him all those. I gave him all the payments, how I keep track of the payments, how much principal is paid and how much interest is paid.

Q Now, we have introduced into evidence, photostatic copies of those records. These are records that you freely gave to him, isn't that correct?

A. Right, yes.

Q All right. Now, following that, did there come a time when Mr. Krysztof introduced you to a Mr. Brownell?

A. Yes. That was sometime later. Again, my wife said that there was somebody at the house earlier when I came home and she says, "It looked like the IRS man", so I says "Maybe he will go to the same place where he talked to me before, Park Lounge", so I went over there and he was there with Mr. Brownell and they both had a bottle of beer at the bar so I came in and we shook hands and everything and he says, "Can we speak to you", and I says, "Okay", so we went into the back room and I even called the bartender and I asked them to have a drink and they had another bottle of beer in the back room and I had a bottle of Seven-Up because I wasn't drinking that day.

Q. Now, did he ask you about cash on hand that day?

A. That day he asked me, he says, "What's the most cash you have on hand", and I thought he meant like in my pocket. I says, "I don't know, it could be two hundred, it could be two thousand."

Q. Now, have there been times when you carried personal funds of $2,000 in your pocket?

A. Oh, yes, many times.

Q. Now, this is not for purposes of investment?

A. No.

Q. You just had it?

A. I just happened to have it.

Q. Now, this particular day, do you recall how much you had in your pocket?

A. I think I had about $300 in my pocket that day.

Q. Now, at any time, did any Internal Revenue Agent ask you if you saved money at home?

A. No.

Q. You will have to speak up.

A. No, they did not.

Q. You recall Mr. Quinn asking you about a $10,000 figure when you were in the IRS Office?

A. Are you speaking of the wife's savings?

Q. The bond.

A. The bond, yes. I told him that she had that much saved and I bought the Federal Bond with that and then later on, we cashed the bond in and we took the bond into the Erie County Savings and she got a time certificate.

Q. Now, many of these mortgages, Mr. Gay, you have put into your wife's name?

A. Yes.

Q. All right. Also some accounts into your wife's name?

A. Yes.

Q. Can you tell us the reason for that?

A. Well, my wife, - in the beginning, I really got my beginning from my wife's mother and her mother, during the war years, stayed with us for awhile because her only son was in the war so she stayed with us and she left her a little cash and I felt it was like partly hers.

Q. Now, when you took this trip in October of '70, did you do anything with any cash that you had at that time?

A. Yes. That I was afraid to leave at home and I asked my son-in-law if he would hold it for me.

Q. And where did you give it to your son-in-law?

A. At South Park Electric.

Q. Now, you heard of, or you know Mr. Russo, - that would be your son-in-law's father?

A. Yes. I got very well acquainted with Mr. Russo.

Q. All right.

A. After my daughter married his son, his father used to own a race horse at Hamburg Raceway and he used to have a box there, so sometimes, I would go to the Hamburg races and I would sit in his box and we would spend the evening there.

Q. At the race track?

A. At Hamburg Raceway, yes.

Q. All right. Now, did you make bets on horses?

A. Yes, we made bets.

Q. Large bets?

A. No, not too large, just regular wagers.

Q. That would be you and he?

A. Me and him.

Q. Did you ever go to any other race track with him?

A. Yes. We went to Fort Erie together during the summer time when there was a summer meet. I used to say, "Sam", - I called him "Sam". I would say, "Sam, why don't you and me go to Fort Erie tomorrow", and he would say "Okay", and we would go to Fort Erie for the afternoon.

Q Did there come a time when you made a loan to him, sir?

A In 1967. There was some property that he wanted to buy and he told me about it and he says he is a little short, he can't swing it and I says, "Well, how much would you need", and he says, "Twenty thousand will swing it, and so I says, "Sam, I will loan it to you", and he says, "Would you", and I says, "Yes", and I did.

Q And how did you give it to him, in what form?

A In fifties and hundreds, twenty thousand in four packs of five thousand.

Q Cash?

A Cash.

Q And how did he pay you back?

A I believe he paid me in '68 twice five thousand and I think in '69, he gave me a thousand. I mean, ten thousand.

Q All right. Now, the mortgages that we have heard about from the various friends of people that you have given mortgages to, we have spoken about Mr. Messina?

A Yes.

Q. Was he your attorney?

A. Well, I used him for different mortgages there, yes.

Q. Now, on this particular transaction with Mr. Russo, was there any formal papers drawn up?

A. Actually, I didn't request any. I said, "Sam, you are a friend of mine and I know I can trust you", and my daughter had told me that he is a very honorable man so I didn't request any papers, but he insisted that he is going to call his attorney and he is going to give me like some security, like a summer cottage that he had in Angola and the home they lived in. It was like a collateral.

Q. Who drew those papers up?

A. His attorney, Laduca.

Q. His attorney?

A. His attorney.

Q. Was that an interest-bearing loan?

A. No, sir.

Q. He paid no interest?

A. No, sir.

Q. All right. Now, Mr. Gay, have you ever purchased any property throughout the years?

A. Well, I purchased, yes, I purchased at one time on Fredro Street there was six lots that one woman had bought and she couldn't, - somehow, - it was more than six lots. It was about nine or ten lots and she couldn't keep up the payments on them and I believe I was a liquor salesman at that time and I used to call on her. She had a tavern. Her name was B-l-a-c-k, Black, and she told me about it. She says, "Joe", she says, "Why don't you take six of these lots off my hand and I will be able to save the rest. Otherwise", she says, "I might lose them all", so they were $600 apiece, forty-five by a hundred. To me it sounded like a terrific investment so I said, "I will be glad to take them off your hand". In other words, I gave her $3,600 for six lots at that time.

Q. Now, when was that, Mr. Gay?

A. Oh, that must have been, maybe 1950, around that period.

Q. All right, and what did you eventually do with those lots?

A. Well, I knew of a builder, a Mr. Malik, M-a-l-i-k, and he said, "Joe, you own all those lots there", and I said, "Yes", and he says, "Why don't we build some houses", so from the beginning, I said, "I don't know anything about building", and he says, "Well, we can build a few houses and make some money", so then he says on six 45's by a hundred, we can put four houses. We will use sixty. Instead of forty-five, we will use sixty feet so we will build four houses," so finally, I agreed and I built the four houses with him. I mean, I didn't build them, he built them, so there were like two he built for himself and two for me on the land that I owned so I sold the house he built for me and eventually the other house we lived in the other house and still do.

Q. That is 3 Fredro Street?

A. 3 Fredro Street. That was built in '55.

Q. Now, had you owned a house that you were living in prior to moving into that?

A. Yes, at 193 Weimer Street and I sold that.

Q. All right. Did you make a profit on that?

A. I made, $6000 on that sale.

Q. All right. Did you make a profit on the house that you sold from the lots that you had?

A. Yes, I made approximately $4,000 on that.

Q. So that from thirty-six hundred, you end up with an approximately $10,000 profit and a new house?

A. Well, I mean I had to pay for the new house. I didn't wind up with the new house.

Q. This was your investment?

A. Right.

Q. And is that the type of investment that you would look for over the years, Mr. Gay?

A. Yes.

Q. Now, we have heard of another piece of property.

A. Yes.

Q. That you had owned. Can you tell us about that?

A. 1787 Clinton Street.

Q. All right.

A. That was a club that was a singing society and it was going under. They weren't paying their taxes and they were threatening to lose, - it was going to be auctioned off or foreclosed or whatever. I found out about the place being auctioned off and I bought the place at auction and then I sold that after.

Q. To whom did you sell it?

A. I sold that to Mr. and Mrs. Peter Wisniewski, PAW, later on the PAW, Peter White Company.

Q. Was that the accountant that testified here?

A. That was the property that the accountant was testifying about over here, yes.

Q. Now, what did he testify? He testified with respect to one mortgage. What mortgage did he testify to?

A. That was the last one which Mrs. Wisniewski took on a home that she bought on Cable Street and she asked for a six thousand mortgage which I gave them, but this was a previous mortgage. This was in the 50's.

Q. All right.

A. There was thirteen thousand five hundred on that property.

Q. You had a mortgage of thirteen thousand five hundred on that property?

A. On 1787 Clinton Street, yes.

Q. That would have been what you gave in the 50's?

A. That's the property I originally bought at auction and I sold to them.

Q. Did you make a profit on that?

A. Yes.

Q. All right, and then you again gave another mortgage of six thousand?

A. After this one was paid, that's when she took the next mortgage.

Q. But the accountant did not testify about the original mortgage?

A. No. I don't think he was asked about it.

Q. All right. Now, what other piece of property did you purchase?

A. Well, I purchased a lot in West Seneca.

Q. And that was in 1971?

A. '71, yes. It is a sizable lot and I paid $3,000 for it.

Q. And you still hold that?

A. I still hold it. I figure it is a good investment. Someday it will pay.

Q. Now, Mr. Gay, when you gave your son-in-law the money in 1970 when you went on that trip, did you know what he had done with it?

A. No. I just told him he could hold it for me until I get back.

Q. And did he give it to you when you came back?

A. Yes.

Q. You are now employed where?

A. At South Park Electric Company on South Park and Marilla and South Park and Okell.

Q. All right. Now, what was your starting salary when you first started with them?

A. $10,000.

Q. That would be yearly?

A. Yearly.

Q. And have you - -

A. Ten thousand four hundred, I think it was.

Q. All right, and have you gotten raises?

A. In '73 I got a raise to fifteen thousand six hundred. In '74, it became twenty thousand eight hundred and in '75 I now make $25,000 per year.

Q. And you are now an officer in the company?

A. I am an officer. I am the treasurer of the company.

Q. Throughout the years, did you employ an accountant, sir?

A. Yes. I employed Mr. Frank Kuras. He is a former IRS man and he always used to take care of all my,- whatever accounting I needed to be done, my books and all that, my income tax and everything.

Q. All right, and - -

A. I was going to say then in the 60's, he started getting ill, around '68, '67. I don't know what was wrong with him, but he started being very forgetful [illegible] then around '70, he went in with a Mr. Willis and eventually, around '70, Mr. Willis took over his accounts and then Mr. Willis is now the accountant.

Q. He is now your accountant?

A. Mr. Willis is now the accountant, yes.

Q. And he is the individual that testified here?

A. He is the one that testified here, yes.

Q. With regard to the '71 tax?

A. Right.

Q. Mr. Kuras, what is his health today?

A. Very bad. I don't think he will remember from one minute to the next. In other words, he will be calling me. One day he will be saying "Joe", and the next day he will be saying "Frank". His mind is wandering.

Q. As Mr. Willis continued to do your taxes?

A. Yes.

Q And he is the individual that accompanied you to the IRS?

A. He is the individual that went with me through the hearings, yes.

Q All right. Now, did you cooperate fully with the IRS?

A. I cooperated fully right from the beginning. I supplied every record they asked for.

Q Did you hold back any records that they asked for?

A. No, sir. I gave them every record that they asked for.

Q Now, we have in evidence, sir, the bank books themselves. Were you ever asked to produce these bank books for the IRS that we put in evidence as Defendant's exhibits?

A. I don't recall if they ever asked for those. I think they went to the banks themselves and got the records from the banks.

Q All right, but these are the bank books you still have in your possession?

A. Right.

Q Even though some of them may be closed?

A. Some of them are closed, yes.

THE COURT: I think, ladies and gentlemen, we will take a recess at this time and resume tomorrow. I think we can start at 9:30 tomorrow morning and we will continue the testimony in this case at that time. You may go out with the marshal. Keep in mind my prior instructions to you. Spectators, stay in your places while the jury goes out.

(Jury escorted from the courtroom.)

THE COURT: We will be in recess.

(Recess taken at 4:30 p.m.)

* * * * * * * * *

PROCEEDINGS: April 8, 1976, 9:40 a.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury present.)

JOSEPH GAY, the defendant herein, having been previously duly sworn, resumed the witness stand and testified further as follows:

DIRECT EXAMINATION BY MR. MURPHY (Resumed):

THE COURT: Mr. Murphy, are you ready to continue?

BY MR. MURPHY:

Q Yes, your Honor. Mr. Gay, yesterday we left off at your production of the bank accounts, is that correct, sir?

A Yes.

Q You produced the bank accounts here in Court?

A Yes.

Q And all of the books?

A Yes.

Q At no time did any Federal Agent from the IRS ask you to produce those accounts during the investigation, is that right?

A Not that I recall.

Q Now, Mr. Gay, you did have some bank accounts, is that correct?

A That's correct.

Q Mr. Gay, why is it you did not deposit all of your money in the bank?

A I have been in the habit of keeping cash ever since the '40's. I feel safe with cash. I have always done the business, a lot of business in cash and I feel I should have it on hand whenever an opportunity arises I have it available.

Q All right. Now, mention has been made of the Park Grill. Did you, sir, - do you now own an interest in the Park Grill?

A No, sir.

Q Have you ever owned any interest in the Park Grill?

A No.

Q Did you ever lend your money, - I'm sorry. Did you ever lend your brother any money for the purpose of purchasing or financing the Park Grill?

A No, sir.

Q Now, when the Park Grill first opened was that its original name? When your brother first bought it was that what he named it, the Park Grill?

A I think it was Gay's Lounge.

Q Now, did you assist him in any way in the operation?

A. From the beginning. From the beginning because I had experience from having a tavern before and I was also a liquor salesman and I told him what I knew about buying whiskey and about operating the place.

Q. All right. Did you ever help out by bartending?

A. Occasionally from the beginning when he needed a little help I did.

Q. All right. Were you paid any money for this?

A. No sir, no sir.

Q. Mr. Gay, you indicated that your son-in-law's father, Mr. Russo, was the owner of a horse, is that correct?

A. Yes.

Q. And what kind of a horse was that?

A. It was a trotting or pacing horse.

Q. All right. Now, and that would be the type of horse would run at Buffalo Raceway and Batavia?

A. Buffalo Raceway. The name of the horse was Bright Gold, I remember the name.

Q. Now, have you yourself ever owned a horse?

A. Yes sir. I owned a race horse and I raced him in Canada at Fort Erie, Woodbine, and that was around 1969.

Q. And do you have, sir, a card which indicates your ownership of a horse?

(Defendant's Exhibit Number 23 marked for identification.)

BY MR. MURPHY:

Q Mr. Gay, I show you Defendant's Exhibit Number 23 for identification and can you tell me what that is, sir?

A That is an ownership, ownership license.

Q And issued by whom?

A To operate under the Racing Commission of, - Ontario Racing Commission.

Q Now, with an owner's certificate and an owner's license are you able to go into the track at times when it is not running?

A Yes. You can go there anytime in the morning and watch them train and go right to the stable area.

Q And you would have the right to clock any horse?

A Right.

Q That was working out?

A You go right into their cafeteria and you eat with the jockeys and the owners and trainers.

Q Now, have you, in your lifetime, gone to horse races?

A Yes.

Q All right, and do you bet?

A Yes.

Q All right. Have you ever won large sums of money betting on horses?

A. No. I have one sums and then I have also lost sums.

MR. MURPHY: I will offer the Exhibit in evidence, your Honor.

MR. MELLENGER: No objection, your Honor.

THE COURT: All right. Mark it in evidence.

(Defendant's Exhibit Number 23 received in evidence.)

BY MR. MURPHY:

Q Mr. Gay, to the best of your knowledge and excluding, - strike that, please. The Government's witness, Mr. Russo, indicated that there was a failure on your part to declare dividends from Niagara Mohawk. Do you recall that, sir?

A. Yes.

Q Now, when you received from Niagara Mohawk a sheet with regard to how much dividends had been paid to you at the end of the year, what did you notice with regard to those dividends?

A. Every year they send you one of their copies stating how much tax is payable and how much, - on the dividends, - I mean how much of the dividend is taxable and how much of the dividend is not taxable. Certain years they were a hundred per cent exempt.

Q In other years they were - -

A They were eighty per cent exempt. Some years they might have been sixty per cent exempt. I always handed that to my accountant.

Q All right. Now, to the best of your knowledge, did you always give to your accountant all of the materials necessary to report all of your income?

A All of the 1099's, whatever they are called, at the end of the year that would come from the banks, from the stock companies, I would turn all those over to the accountant to be put into my income tax return.

Q All right, and the Gay Printing records?

A I gave him that. I gave him how much business was done and how much expense was involved.

Q How about the mortgage payments?

A The mortgage payments I always totaled up each name, how much interest they paid and I gave him each name and they paid so and so much interest for the year. I gave him all that every year.

Q Now, sir, did you at one time receive interest on Federal Bonds which you believed to be Federally exempt from taxation and State exempt?

A That's correct.

Q And did you later find out that they were not Federally exempt?

A. I later found out that they were State exempt but they were not Federal exempt.

Q. Mr. Gay, you made, did you not, during the course of the years in question, '67 through '71, estimated tax payments?

A. Yes.

Q. And who would figure that out for you?

A. The accountant. The accountant would from the tax that I paid that certain year.

Q. Now, when would he figure it out?

A. Well, when he was figuring my tax return for the year then for the following year he says, "You better put so and so much in on your estimated tax every three months".

Q. And did you do that?

A. Yes, I did.

Q. Mr. Gay, the $120 that was payable on interest from the association you belonged to?

A. Yes.

Q. What was with that? You failed to report that.

A. Well, I never received any 1099 and that may have been overlooked.

Q. Now, did you intentionally - -

A. No sir, I never intentionally overlooked anything.

Q Have you ever intentionally failed to pay a tax or declare income, sir?

A. Never.

MR. MURPHY: You may ask.

CROSS EXAMINATION BY MR. MELLENGER:

Q Mr. Gay, yesterday your daughter took the stand, Mrs. Russo, I believe.

A. Yes.

Q She said it was her understanding that when your brother opened up the Park Lounge or Gay's Lounge that you had a 50 per cent interest in that?

A. Well, she didn't know. I used to help him and she maybe thought that I was in with him.

Q And she also said at some point he bought you interest out.

A. Again, she doesn't know.

Q Now you say that is incorrect?

A. That is incorrect.

Q How long has your brother Leonard worked for the Buffalo Savings Bank?

A. At least 25 years.

Q And how long has he owned the Park Lounge or Gay's Lounge?

A. About 15 years.

Q. During the day, when he is working at Buffalo Savings Bank, who manages the tavern for him?

A. Right now his son is there.

Q. Did you ever manage the tavern for him?

A. Not actually manage it, no.

Q. Did you ever have occasion to work there as a bartender?

A. Occasionally if he needed help I did. I helped.

Q. Did you ever work there on a regular basis?

A. Never.

Q. Now, yesterday you stated that you had gone with Mr. Russo, Sam I believe you called him?

A. Yes.

Q. To the race track on numerous occasions?

A. Yes.

Q. And Mr. Murphy asked you about placing bets?

A. Yes.

Q. And you stated at that time you had bet what you called regular amounts. What do you define a regular amount as being?

A. $10.

Q. Did you ever place bets for more than $10?

A. Yes, if it would be a winning day we would increase it.

Q. What would be the highest bet you ever placed at a race track?

A. $100.

Q Mr. Murphy was asking you about preparation of your tax returns and as you told, I believe, Mr. Krysztof and as you just stated on the stand, you would supply all the information to your accountants for the preparation of those tax returns?

A. That's correct.

Q You would summarize it all?

A. Yes.

Q How about as to your printing business?

A. I would total up whatever amount was taken in for the year and give him that as receipts and then I would figure out whatever expenses was involved and I'd give him that.

Q So you wouldn't take your check book and all your records and give them to your accountant?

A. No.

Q You would total them up yourself?

A. There are cases where I buy material. I go to a Catholic store and I buy pictures for undertakers that I print the back on when somebody passes away. I usually buy that cash and I have to keep those records. I don't do everything with checks.

Q I am not asking you that. You were the person who supplied the figures to your accountant for your tax return?

A. Yes.

Q. And you made your determination as to what your income was?

A. Right.

Q. You wouldn't take your check book and cancelled checks and give them to him for the year?

A. No, no. He never asked for the whole check book, no.

Q. And you never gave him your records of what was received and what was paid out, you never gave him those records, did you?

A. No. I just would give him the figures.

Q. Now, you remember Mr. Krysztof testifying, do you not?

A. Yes.

Q. He is a Special Agent with the Internal Revenue Service?

A. Yes.

Q. And you heard him testify about the initial meeting with you on December 28, 1971?

A. Yes.

Q. And you heard him testify that he asked you at that initial meeting about your investments?

A. He asked me mainly about mortgages.

Q. About mortgages or all investments?

A. From the first meeting all I remember is, "Where did you get all these mortgages"?

Q. Did he ask you about stock transactions?

A. No, not at the first meeting, not that I recall.

Q Mr. Krysztof testified you had conversation about your brokerage accounts at Loeb, Rhoades.

A He asked me who, if any, brokerage accounts I had and I gave him Shields and Company and Loeb, Rhoades and Company.

Q Didn't he ask you about all your investments at that time, what investments you held?

A No, I don't recall.

Q Now, you maintained your checking account at the Marine Midland Trust Company, is that correct?

A That's correct, sir.

Q That is the Clinton and Weimer Street Branch?

A Yes.

Q You also have a safe deposit box there, do you not?

A Yes.

Q And in what year did you acquire the safe deposit box?

A I don't exactly remember. But not too long. It might be five, six years ago.

Q Would it be '67?

A I don't even know, - think I had it in '67. I think it was later.

Q What did you keep in that safe deposit box, Mr. Gay?

A Mostly papers, "E" Bonds, "H" Bonds and stocks.

Q Isn't it a fact you have never kept cash in that safe deposit box?

A. I never kept cash in the safe deposit box.

Q. Mr. Krysztof asked you at that interview whether you had any trust accounts for anybody, didn't he?

A. I don't remember.

Q. Now, you had testified yesterday that at the initial interview, Mr. Krysztof asked you about cash on hand, is that correct?

A. No, he didn't ask me at the initial interview anything about cash on hand that I recall.

Q. Didn't you say to Mr. Krysztof at that initial interview you could not determine cash on hand because that would depend on savings accounts withdrawals, mortgage proceeds received, mortgage interest received, dividends received and other miscellaneous amounts?

A. Might have been so.

Q. I am showing you what is marked as Court Exhibit Number 3 which is the memorandum of interview between Mr. Krysztof and yourself on December 28, 1971. Calling your attention to the second paragraph of that interview entitled "Cash on hand", would you read that, please?

A. Do you want me to read it out loud?

Q. No, just to yourself.

THE COURT: Just to yourself, Mr. Gay.

THE WITNESS: Yes.

BY MR. MELLENGER:

Q Do you remember that conversation, Mr. Gay?

A. Yes. I remember stating to him that sometimes there is an accumulation of checks and different things and as a matter of fact, I think I told him that time I had over $2,500 in checks on hand at that time.

Q You told him you had over $2,500 in checks?

A. From payments of mortgages and so forth, stock dividends or what have you.

Q Now, calling your attention to the later meeting of June 8, 1972, at which point you met with Mr. Krysztof and Mr. Brownell, the one where you said you went to the bar to meet them?

A. Yes.

Q They again asked you about cash on hand at that time?

A. Yes.

Q And what did you tell them at that time?

A. Well, we were sitting at a back table there and we were having a drink and he says, "How much, what is the amount of cash you keep on hand", and if I remember correctly, I said, "It might be two hundred or three hundred or two thousand".

Q Okay, and what did you understand to mean cash on hand at that time?

A. Meaning on hand, on person, on my person, what have you.

Q Now, going back to the December 28, 1971 interview, you were talking about items included in cash on hand such as savings account withdrawals, mortgages, dividends, checks received and proceeds of stock transactions, is that correct?

A. Yes.

Q Do you often keep dividend checks and proceeds of sale of securities on your person?

A. Well, I don't run to the bank every time I get a check. Sometimes I let them accumulate.

Q In any event, you understood the definition of cash on hand to be different for December 28th then you did for June 8, 1972, isn't that correct?

A. That's correct. I thought he was referring to me, how much cash do I have on hand.

Q December 28, 1971 you thought he was referring to how much cash you had around the house, is that correct?

A. Well, that's the way I understood it.

Q You had two definitions of cash on hand?

A. I don't know. He might have phrased it differently.

Q Incidentally, you said Mr. Kuras got sick in 1967?

A. Well, he got sick during those years. He had two or three heart attacks, I believe, and then he would get out of it and he would do my accounting again and he would be sick again. He has been sickly for a goodly number of years.

Q. That's why you changed over to Mr. Willis, did you not?

A. That's right. Mr. Willis was working with Mr. Kuras and then when Mr. Kuras was unable to continue then Mr. Willis took over.

Q. Let's go to the interview that you had with Mr. Quinn on February 21, 1973. Do you remember Mr. Quinn asking you if you ever loaned money in forms other than mortgages?

A. He may have. I don't exactly remember.

Q. Do you remember Mr. Quinn asking you whether you had any loans made to members of your family?

A. I don't recall.

Q. I am showing you Court Exhibit Number 10, which is a memorandum of interview you had between yourself and Mr. Quinn on February 21, 1973. Would you read the last two sentences of that paragraph to yourself, please?

A. Yes.

Q. Does that refresh your recollection, sir?

A. Yes.

Q. Mr. Gay, isn't it a fact that Mr. Quinn asked you whether you ever loaned money other than through mortgages particularly in the form of personal loans and you said "No" at that time?

A. Yes.

Q. And didn't he ask you whether you made any personal loans to any members of your family and again you stated "No"?

A. Yes.

Q. Incidentally, regarding the interest on the Federal Intermediate Credit Bank Bonds, you purchased those from Mr. William Spute, did you not, Marine Midland Municipals?

A. Whoever was in charge. I don't remember the name.

Q. You don't remember who you purchased those from?

A. No.

Q. Now, in that February 21st interview with Mr. Quinn, do you remember him asking you how you granted the mortgage loans that you made to people, whether it was in cash or check?

A. If he did, I probably, - the answer would be the same, I don't know.

Q. I asked you to read the last portion of that last paragraph, sir.

A. Yes.

Q. Especially the last sentence.

A. Yes.

MR. MURPHY: Your Honor, may I be heard on the procedure that is being followed by the United States Attorney with regard to this matter?

THE COURT: He can show him this memorandum and ask him if it refreshes his recollection.

MR. MURPHY: I understand.

THE COURT: Any difficulty with that?

MR. MURPHY: No, no. The procedure I do not disagree with, - the procedure. The memorandum was not made out by the witness.

THE COURT: That is true. We all know that. It was made out by the agent who interviewed the witness. He can show him any paper. He can show him a newspaper article if he desires on cross examination. Go ahead, Mr. Mellenger.

BY MR. MELLENGER:

Q Thank you, your Honor. Mr. Gay, does that refresh your recollection?

A Yes.

Q And isn't it a fact that Mr. Quinn asked you how you issued the proceeds of these mortgages and you responded that it could be in cash or it could be in draft, depending on what you had money available.

A In cash or in draft, either way the money had to be available. To get the draft, I would have to go to the bank and give them the cash.

Q. Didn't you tell him, could it possibly been in cash or what or in draft, depending on whether you had that money available?

A. No, sir. I always had money available for mortgages.

Q. Calling your attention to the robbery in 1969, what articles were stolen at that time?

A. There was some cash. There was a couple coats, some rings, the watches, there was a radio and a few bottles of whiskey, as I recall.

Q. What kind of rings?

A. Wedding ring, engagement ring. I had a cameo ring.

Q. What kind of coats?

A. Coats were my wife's fur coats, fur jacket it was. It wasn't a fur coat. It was a fur jacket.

Q. Was that a mink jacket?

A. Yes.

Q. And how much cash was taken?

A. It was between eight hundred and maybe twelve hundred.

Q. And that loss was not fully reimbursed by insurance, was it?

A. No.

Q. Did you have a home owner's policy?

A. Yes.

Q. What is the limit on that policy as to a loss due to robbery as to cash?

A. I believe all they allow is $100.

Q. So they would only reimburse you for $100 robbed from your house, is that correct?

A. That's right, yes.

Q. Incidentally, what are your personal living expenses, say on a weekly basis?

A. I gave, - at that time I was giving my wife a hundred dollars and she managed to save out of that hundred.

Q. Okay. After the robbery in 1969, your wife came to you and told you she had some money, did she not?

A. Well, she told me right that very night.

Q. That very night?

A. Because that's when she first went to see if they found it.

Q. Where did she tell you at that time she had that money?

A. It was in the bedroom behind one of them little dresser things.

Q. What kind of a container was it in?

A. It was in one of her purses.

Q. Now, you heard Mr. Quinn testify that you had told him that your wife had this money in the mattress, is that correct?

A. That's a concoction. That's a laughable matter. They made that a joke.

Q. Did you or did you not tell them it was in the mattress?

A. No, I did not tell them that. I never told them any such thing.

Q. Where did you tell them your wife had the money?

A. I don't even remember telling him where she had the money.

Q. What did you do with this money?

A. I took it and I bought her a Federal Bond.

Q. And why did you do that?

A. Why did I do that, - because I told her, "Now that this happened, not to keep it. I will buy you a bond for this money".

Q. How soon after the robbery did you go out and buy this bond?

A. Not long after. I just don't remember, but it wasn't long after.

Q. And you decided to get rid of some of your available cash at that time, is that correct?

A. Yes.

Q. What did you do with your cash?

A. Well, I started checking into different stocks, what I should buy and then I went to see the manager of the Marine Bank at that time and I told him I was interested in tax exempts and so forth.

Q There came a time when you bought some of these tax exempts?

A. Yes.

Q Did you buy them with this cash?

A. Yes, some.

Q Didn't Mr. Quinn ask you at one time to provide him with a list of repayments of principal on mortgage loans?

A. Yes. I gave him that voluntarily.

Q And that is a list which he read off his report on the stand?

A. I told him that when the mortgage is paid, I said, "There is also money coming in as principal that wouldn't show on that tax return because it is a return of principal".

Q But he was interested in the return of principal, not in the interest, isn't that correct?

A. Well, he asked me about the amounts.

Q And you never told him about any principal repayments from your daughter and her husband, Mr. and Mrs. Russo, did you?

A. Well, I considered that a personal affair.

Q And you never told him about any principal repayments from Mr. and Mrs. Hobart, did you?

A. That is also a personal affair.

MR. MURPHY: I will object to this on the ground that the United States Attorney is using the word "principal".

THE COURT: What is it if it is not principal?

MR. MURPHY: Well, it was a non-interest loan, your Honor.

THE COURT: Then it is principal. If I loaned you money and you pay me principal and interest then there must be a computation of principal and interest. If I owed you money and as I understand it, this is what the other witnesses testified, and there was no interest, then the repayment would necessarily be principal by common definition. Overruled. Go ahead, Mr. Mellenger.

BY MR. MELLENGER:

Q Thank you, your Honor. You never told Mr. Quinn about principal repayments made by Mr. Russo's father, did you?

A Mr. Quinn was primarily interested in whatever interest bearing loans I had. Interest bearing loans. He wasn't asking me about loans that bore no interest.

Q Mr. Quinn asked you about principal repayments, did he not?

A. On the mortgages that I was getting interest on.

Q. Incidentally, Mr. Gay, when did you start purchasing securities such as stocks?

A. In the beginning of the '50's. I don't recall just when.

Q. You know what the Federal Deposit Insurance Corporation is, sir?

A. Yes.

Q. What is that?

A. That is the bank where they insure your deposit up to a certain amount.

Q. Now, yesterday when you were testifying, you said you purchased a tavern business in 1939?

A. Yes.

Q. And that was for $15,000?

A. Yes.

Q. But you also testified that you did not purchase the building or the real estate where that business was located?

A. That's right.

Q. Then you went on to say that two years later you turned that tavern business around and sold it for $65,000 and that did not include the building?

A. No, I didn't say I sold it for $65,000. I said that when I gave up the tavern business, I had a sum of $65,000.

Q. How much did you charge for a glass of beer in 1941, Mr. Gay, the tavern?

A. Ten cents.

Q. You had to sell a lot of glasses of beer to get $65,000.

MR. MURPHY: Well now, I object.

THE COURT: Mr. Mellenger, strike that remark. It is your function to ask questions. Mr. Gay, describe what your place consisted of, how many employees did you have?

THE WITNESS: It was run by myself and my family, my wife and her mother and we had fish frys on Friday and Saturday and chicken dinners on Saturdays.

THE COURT: All right. You say you gave it up or did you sell the business?

THE WITNESS: I sold it.

THE COURT: Did you own the real estate then?

THE WITNESS: I did not own the real estate.

THE COURT: So you just sold the business itself?

THE WITNESS: Right, and whatever equipment belonged to me.

THE COURT: All right. Do you remember now how much you got on the sale?

THE WITNESS: $20,000.

THE COURT: All right. You say that after two years you had, - what is this, - would you call it a profit of $65,000?

THE WITNESS: No. I said after two years I had a total cash of $65,000. That is what I had cash after I got rid of everything.

THE COURT: Would that include the $20,000 you derived from the sale?

THE WITNESS: That included everything.

THE COURT: Twenty thousand?

THE WITNESS: Yes.

THE COURT: And an extra $40,000?

THE WITNESS: Right.

THE COURT: Was this your earnings for the two years?

THE WITNESS: That, in other words, would consist of what was made during those two years.

THE COURT: That appeared to be a fairly profitable business. Can you explain why you sold it?

THE WITNESS: Well, I didn't care for the locale, the neighborhood itself because every so often we used to have trouble, fights would start and so forth and I just didn't want to go through all that aggravation.

THE COURT: That was an industrial neighborhood at that time, wasn't it?

THE WITNESS: That was residential. Industry, - there was industry around there, yes. It was a mixture of clientele, would be a mixture.

THE COURT: Your customers would be from the warehouses, the warehouses and other industries around there?

THE WITNESS: And people that lived around there.

THE COURT: All right. Go ahead, Mr. Mellenger.

BY MR. MELLENGER:

Q. Thank you, your Honor. Mr. Gay, I am showing you what has been marked as Government Exhibit Number 7 which is a bank book, Joseph Gay as trustee for Dorothy Gay.

A. Yes.

MR. MURPHY: I believe that is a Defense Exhibit.

BY MR. MELLENGER:

Q. Defense Exhibit Number 7, excuse me. What is the date of the first deposit in that bank book?

A. May 30, 1957.

Q. Showing you Defendant's Exhibit Number 11, Joseph Gay as trustee for Lorraine Gay, what is the date of the first deposit in that bank book?

A. October 8, 1962.

Q. Defendant's Exhibit Number 17, what is the date of the first entry in that bank book?

A. December 31, 1960.

Q. Defendant's Exhibit Number 6?

A. May 30, '57.

Q. Defendant's Exhibit Number 5?

A. May 30, '57.

Q. Defendant's Exhibit Number 4?

A. May 30, '57.

Q. Defendant's Exhibit Number 3?

A. May 30, '57.

Q. Defendant's Exhibit Number 2?

A. July 10th, '57.

Q. Defendant's Exhibit Number 8?

A. January 12th, '61.

Q. Defendant's Exhibit Number 9?

A. November 23rd, '54.

Q. Defendant's Exhibit Number 1?

A. July 9th, '57.

Q. Defendant's Exhibit Number 10?

A. October 8th, '62.

Q. Prior to the year 1967, going back to the mid 50's, early '60's, you had over 12 bank accounts opened, isn't that correct?

A. The reason for that was because - -

Q. Is that correct, "yes" or "no"?

A. Yes.

Q. Mr. Gay, what is a special term savings account?

A. It is an account that would pay a little higher interest.

Q. How about a gold pass book?

A. That would also be an account that paid higher interest.

Q. How about a savings certificate?

A. That also is higher interest.

Q. I call your attention to Government's Exhibit, - excuse me, Defendant's Exhibit Number 12.

A. Yes.

Q. What was the date that account was opened?

A. Tenth month, thirteenth day, '70.

Q. And what amount?

A. Twelve thousand. This would be a transfer of funds from some other thing.

Q. Calling your attention to Defendant's Exhibit Number 18, that is a gold pass book account, is it not?

A. Yes.

Q. And in whose name is that in?

A. Joseph and Stella Gay.

Q. What is the date and the amount of the opening of that account?

A. February 1st, '68, three thousand, two eighty-six fifty-six.

Now, that would be the other book, the old book would expire and that was just added on to this book.

MR. MELLENGER: I don't believe this has been marked. It is Erie Federal.

THE COURT: Is that a Defendant's Exhibit?

MR. MURPHY: I have no objection to this being marked as a Defense Exhibit.

THE COURT: Mark it the next Defense Exhibit.

(Defendant's Exhibit Number 24, marked for identification.)

BY MR. MELLENGER:

Q Mr. Gay, I show you what has been marked as Defendant's Exhibit Number 24 and I am going to ask you to look at that and identify that, please.

A Yes.

Q What is that?

A It is a savings book at special interest.

Q And whose name is that savings book in?

A Joseph or Stella Gay.

Q What was the date that account was opened?

A October 8, 1970.

Q And what amount?

A Twelve thousand.

Q. I am calling your attention to Government's Exhibit Number 18 which is a transcript of a savings account you had at Marine Trust Company. I am calling your attention to a transaction dated April 17, 1967. That is a withdrawal of $12,000, is it not?

A. Yes.

Q. Calling your attention to a Marine Midland savings certificate issued on that same date, April 17, 1967, Government's Exhibit Number 19, didn't you take that $12,000 and use that as partial payment for this savings certificate?

A. It is possible.

Q. And this Government's Exhibit 19, the savings certificate, there is a notation on the back. It is a gold pass book. Can you read that number?

A. Yes.

Q. Now, calling your attention to Defense Exhibit Number 18, do those account numbers match, the last digets?

A. Yes.

Q. Mr. Gay, on April 18, 1968 did you not cash in this $25,000 savings certificate and deposit into your gold pass book account?

A. Yes. In other words, the certificate expired so I deposited it in the gold book.

Q. This was a one year certificate, wasn't it?

A. I guess so, yes.

Q. So one year, right to the day, you cashed this in and deposited the proceeds into a gold pass book account?

A. Well, whenever it would become due and payable.

Q. Back to Defendant's Exhibit Number 24, which is the savings certificate you identified at Erie Federal Savings and Loan, didn't you already have an account at Erie Federal Savings and Loan?

A. Yes, a savings book.

Q. A regular interest account?

A. A regular interest account.

Q. Calling your attention to Government's Exhibit Number 58 - -

A. Yes.

Q. A transcript of account in you and your wife's name at the Erie Federal Savings and Loan Association. Is this a transcript of that regular interest account?

A. What do you mean by transcript of the regular interest account?

Q. How many accounts did you have at Erie Federal Savings?

A. Two.

Q. Two, a special interest and a regular interest?

A. A regular account and when it got to be too high I transferred some of it into the special account.

Q. You transferred $12,000 out of this account, October 8, 1970 in order to open the special interest account, October 8th?

A. That's correct.

Q. Incidentally, Mr. Gay, this is Government's Exhibit Number 1. Do you recognize that?

A. It is an individual return for '63.

Q. And who is that for?

A. Joseph and Stella Gay.

Q. Now, at the bottom of Page 2, there is a signature.

A. Yes.

Q. Is that your signature?

A. Yes.

Q. Is that the return you filed for 1963?

A. It must be.

Q. Calling your attention to the Schedule "C" on that return entitled "Profit or loss from business or profession", how much net profit do you show in 1963 from your printing business?

A. Thirty-nine twenty-nine.

MR. MELLENGER: Your Honor, I would like to move Government's Exhibit Number 1 into evidence.

THE COURT: That is a tax return?

MR. MELLENGER: Yes. This is the 1963 - -

MR. MURPHY: I thought it was in evidence.

MR. MELLENGER: No. One was the '63 tax return. That was not in evidence.

MR. MURPHY: I was not aware of that. Asking to have a witness testify to something not in evidence yet?

THE COURT: Let me see it. Mr. Knisley, can you step over?

(Sidebar conference held between Court and Counsel as follows:

THE COURT: This is the 1963 return which is 4 years before the beginning of the period. Why should this be in evidence?

MR. MELLENGER: Well, your Honor, I think at this point if the Government - -

THE COURT: I can not hear you.

MR. MELLENGER: The Defense has put Mr. Gay's entire printing capacity in the years prior to the indictment in question, basing its defense on the fact there was a prior cash hoard and any financial statement the Government can produce from prior years is relevant to the fact of whether he had this prior cash hoard.

THE COURT: Where is the part you are referring to?

MR. MELLENGER: Right here.

THE COURT: You are looking at - -

MR. MELLENGER: Net profit from business.

THE COURT: Profit or loss from business?

MR. MELLENGER: Yes.

THE COURT: And in this year he said he made $39.29 from Gay's Printing. That has nothing at all to do with his history. His history was that he had this money from other investments for a period long before 1963. During all this period of time, Mr. Gay, even at this time, indicates that he has income from dividends, interest. I guess he was not employed at that time.

MR. MURPHY: Your Honor - -

THE COURT: I can see that this area may be pertinent but not in the way, - it just does not make any difference the way you ask about it. Mr. Murphy.

MR. MURPHY: Yes, your Honor. As your Honor will recall, your Honor asked the United States Attorney and I to agree on the Exhibits which go in evidence with respect to returns. Pursuant to that conversation Mr. Mellenger told me he wasn't going to put Number 1, and then he utilizes Number 1 as though it were an Exhibit in evidence.

THE COURT: I think Mr. Murphy has a very good point. If you were going to, for some special reason, change your representation you made to him, and sometimes that does become necessary, you ought to at least tell him about it, but the other thing is the point you are making here just does not have any connection at all with the case.

MR. MELLENGER: Your Honor, I think a tax return is essentially, I think a financial statement of an individual.

THE COURT: When you say a financial statement, this is not a financial statement. If there was some financial statement he had given to a bank where they would ask him, "How much cash do you have of any kind anywhere", and he said "$3,000" or "none", maybe that would be important, but the fact that he earned $39 from his printing business for the year 1963 does not have any pertinency whatever. I will sustain the objection. I won't put it in.

(Sidebar conference concluded.)

BY MR. MELLENGER:

Q. Mr. Gay, isn't it a fact that in 1966 you purchased 500 shares of Niagara Mohawk stock?

A. If the date is correct, it is a fact.

Q. Did you purchase any United States Steel stock in that year?

A. I owned 100 shares of U.S.Steel.

Q. How long ago on that?

A. I don't remember when I purchased it.

Q. Calling your attention to July 3, 1973, did you come to this building with your Attorney Crucian Messina and your Accountant Ted Willis for an interview with the Internal Revenue Service?

A. Yes.

Q. It was downstairs on the third floor here?

A. I don't remember just where.

Q. Do you remember of the Representative Mr. John Stele telling you that the Special Agents had recommended criminal prosecution against yourself?

MR. MURPHY: I object.

THE WITNESS: Yes.

MR. MURPHY: This is immaterial and irrelevant, your Honor.

THE COURT: Certainly whatever recommendation was made by any Special Agent or anyone else is completely irrelevant and immaterial. Why don't you come up here, Mr. Mellenger, so we can get the point of this. You should strike that question from your mind, ladies and gentlemen. It does not matter one iota what the Special Agent or a Revenue Agent or a lawyer for the Government or anyone else thinks about the merits of the case whatsoever. That is completely irrelevant.

(Sidebar conference held between Court and Counsel as follows:

MR. MELLENGER: He was here for a conference in 1963 at which time he was informed criminal prosecution had been recommended and they were also informed at that time of the expenditures method and everything and I am trying to elicit testimony of the fact he still did not provide them with a cash hoard.

THE COURT: Were there certain questions and answers at that time? You did not have a "Q" and "A"?

MR. MELLENGER: No.

THE COURT: This is what you want to ask about?

MR. MELLENGER: Yes.

THE COURT: At that time were you asked about the amount of cash on hand as of December 31st and did you refuse to give that information?

MR. MELLENGER: Yes.

THE COURT: All right. Mr. Murphy.

MR. MURPHY: He is represented by an attorney. He has every right in the world to refuse to give it.

THE COURT: I will permit it because this has to do with whether or not he understood what it meant. Of course, that went back to the prior meetings. Just seems to me that of course he has the right to remain silent.

MR. MURPHY: That would be fine if he were there by himself but he has an attorney with him advising him what to do.

THE COURT: The fact he did not make any statement at all, I do not think you can bring that out.

MR. MELLENGER: Okay.

THE COURT: If he gave an answer and you had "Q" and "A" it would be different because we would have question and answer but we do not.

(Sidebar conference concluded.)

BY MR. MELLENGER:

Q Mr. Gay, regarding your printing business, exactly what type of thing did you print in your basement?

A Just average regular printing.

Q Did you print books or - -

A Business cards, letter heads, envelops, tickets.

Q Say in an average week, how many hours would you devote to the printing business?

A Not too many.

Q Five or ten, approximately?

A Oh, maybe eight hours, ten hours, twelve hours.

Q In any event, much less then forty hours a week?

A. It wasn't forty hours, no.

Q. Now, you have been present through the whole trial, Mr. Gay, and you have heard all the Government's proof. Do you deny making any of those expenditures in the years in which the Government's proof has indicated?

A. I do not deny any expenditures.

MR. MELLENGER: I have no further questions.

REDIRECT EXAMINATION BY MR. MURPHY:

Q. Mr. Gay, with regard to the Court Exhibits that you were shown when you were talking to Mr. Quinn, when you were talking to Mr. Krysztof, did you make those reports out, sir?

A. No.

Q. Have you ever seen them prior to today?

A. No.

Q. When the U.S. Attorney asked you, is that right?

A. That's right.

Q. Now, was anybody taking down the questions and answers or making shorthand notes like the stenographer here at those meetings?

A. No, sir.

Q. All right then. Mr. Gay, you told them all of these expenditures were in your bank accounts, were in your mortgage records, were in your check book, were in your various Government bonds, they were all in, the brokerage houses that you worked with, all that you told to the Federal people, did you not?

A. I did.

MR. MURPHY: That is all.

MR. MELLENGER: I have nothing further, your Honor.

THE COURT: All right, Mr. Gay. Thank you.

MR. MURPHY: Defense rests, your Honor.

THE COURT: You rest. Let us do this, ladies and gentlemen; we will take a short break so I can talk to the lawyers for a minute and do not talk about the case during the break. We have some other things to do yet. Spectators stay in your places, please, while the jury goes out with the Marshal.

(Jury escorted from the courtroom.)

THE COURT: Mr. Murphy, we have motions, but Mr. Mellenger, do you have any rebuttal evidence?

MR. MELLENGER: No, your Honor.

THE COURT: No rebuttal. Mr. Murphy, do you have a motion?

MR. MURPHY: Yes, your Honor. I would make the normal motions made at the end of the case. I renew the motions made at the end of the People's Case and now that the entire case is in I move for judgment of acquital.

THE COURT: I will reserve decision on that, Mr. Murphy. There are some questions in my mind here but I will let it go to the jury. The next step, I told you I would not be here tomorrow and I dislike in this kind of a case, because I think there are some serious questions summing up today and charging today and what I would like to do is defer the summations and charge until next week.

MR. MURPHY: I agree wholeheartedly on behalf of the defense, your Honor, in that this jury might very well be out overnight and if your Honor is gone and if they were asking for anything - -

MR. MELLENGER: I would agree with that also.

THE COURT: Why don't we have the summations on Monday afternoon and we wil have the charge on Tuesday morning?

MR. MELLENGER: Fine, your Honor.

THE COURT: Would that be all right?

MR. MURPHY: Fine, your Honor.

THE COURT: I will have the jury come back and tell them what the schedule is and then I want to meet with you because I have some questions with both of you about some of the problems as I see it as far as the charge is concerned. Do you have any requests ready, Mr. Mellenger?

MR. MELLENGER: Yes, I do, your Honor. I would like to have a chance to revise certain portions of that charge.

THE COURT: Why don't you deliver that to Mr. Murphy. Can you do that and we can meet this afternoon?

MR. MELLENGER: Yes, your Honor, sometime.

THE COURT: So we can discuss the proposed requests. Do you have any requests, Mr. Murphy?

MR. MURPHY: Not at present, your Honor.

THE COURT: Mr. White, would you have the jury come back.

(Jury returns to the courtroom.)

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THE COURT: Ladies and gentlemen, we have decided that the best course to follow, because there are some things we must do, is to adjourn your next appearance until Monday afternoon at 2:00 p.m. The evidence is now closed. The next step in the case will be the summations of the attorneys and after that I will charge you on the law which applies. I think probably what will happen is that we will hear summations on Monday afternoon and then I will have you come back on Tuesday morning and I will charge you on the law which applies to the case.

Over the weekend, and it will be a long weekend, one thing you have to, certainly to the best of your ability, keep in mind, what the testimony is all about. On the other hand, do not talk about it or discuss it with anyone. Wait until you are back in Court. Do not make up your mind about any part of this case until you listen to the summations and my charge on the law.

You may now go out with the Marshal

and you will be excused for the day.

(Jury escorted from the courtroom.)

THE COURT: Mr. Murphy and Mr. Mellenger, could I meet with you today at 3:00 o'clock?

MR. MURPHY: Fine with me, your Honor.

THE COURT: At that time you will get the requests to Mr. Murphy and we will be able to talk about it.

MR. MELLENGER: Yes, your Honor.

THE COURT: We will be in recess.

(Recess taken at 10:50 a.m.)

* * * * * * * * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

* *

THE UNITED STATES

-v-

JOSEPH V. GAY,

Defendant.

[illegible]INAL DOCKET
[illegible] 1974-143

* *

Proceedings of trial held before the HON. JOHN T. CURTIN, and a Jury, in Part I, United States Court House, Buffalo, New York, resuming on April 12, 1976.

APPEARANCES:

RICHARD J. ARCARA, United States Attorney by RICHARD MELLENGER, Assistant United States Attorney.

ROBERT M. MURPHY, Esq., Attorney for the Defendant.

* * * * * * * * *

PROCEEDINGS: April 12, 1976, 2:05 p.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury not present.)

THE COURT: Is there anything further to be said on the requests before we begin the summations? I have your proposals, Mr. Murphy, and it seems to me that you say essentially what Mr. Mellenger says, a little bit different language.

MR. MURPHY: Well, I say it quite different, your Honor. The Ford case --

THE COURT: Yes.

MR. MURPHY: -- indicates that the Government has to show a source of income which is taxable income. Mr. Mellenger says he doesn't have to show that.

THE COURT: We had the case of United States against Massiah. If they can negative all other sources, loans, the cash hoard, - the big thing is the cash hoard, let us face up to it.

MR. MURPHY: Yes, sir.

THE COURT: It seems to me it comes down to this; the Government must prove beyond a reasonable doubt that whatever income he received during these years, whatever moneys he had during these years was as a result of income he received during these years; that then it comes to the question here Mr. Gay testified and the other witnesses testified and the other witnesses testified about these moneys he had back in the 1950's and the early '60's and, on the other hand, the Government points to the testimony of the agents where the agent talked to Mr. Gay about the moneys, "What was your cash on hand". It is up to the jury to determine what the testimony was, but keeping in mind the Government must always, - they have the burden of proof beyond a reasonable doubt and as far as weighing which story is so, they must keep that in mind and after applying that burden to the Government, if they determine that Mr. Gay in fact had these cash moneys before the years in question, then those were the moneys which were, or arguably I suppose could have been the moneys that were used during those years, then it is not income. On the other hand, if they believe what he told Mr. Quinn or the other agent was true and he did not have any money, then it was income. I believe that is where it stands. It is really not clear, but the Holland case talks about a likely source and the Ford case, we have Tanquenetti and Fisher talking about this and it seems that you are putting it around the other way, the Government must negative any other sources of income and doing that and the jury believes they have and the moneys were derived by the defendant as income during the years in question, then they consider it as income.

MR. MURPHY: Well, all the cases I read, your Honor, are where the Government came out with a negative proposal where the defendant then came forward or the defendant comes forward with an explanation, it would be up to the

Government to rebut such an explanation and the Ford case the defendant did not take the stand. The only other question I would have, your Honor, is with regard to the charge on circumstantial evidence which Ford indicates that must be given with regard to the expenditures theory.

THE COURT: Excuse me, Mr. Murphy.

MR. MURPHY: Circumstantial evidence, that the Ford case held, as I see it, that the expenditures theory, the part of the Government in failing to show a taxable, a taxable income as such, the expenditures theory then requires that the circumstantial evidence be charged and they must exclude every other reasonable hypotheses except that of guilt wherein the defendant's explanation would be a reasonable hypotheses.

THE COURT: If they believe that what Mr. Gay says is correct, that he had the money before, then that ends the case, doesn't it?

MR. MURPHY: I would expect it should, yes, your

Honor.

THE COURT: Do you agree, Mr. Mellenger?

MR. MELLENGER: I agree, your Honor, it is a question of fact as to whether this cash hoard did, in fact, exist prior to the prosecution years or did not. I believe it is a jury question.

THE COURT: Some of these cases get to be all mixed up with a lot of loans going in and out, inheritances, other moneys coming in and out, determination of whether it was income or not income.

Mr. Murphy, of course, you want to be able to sum up with a point of view. I am troubled because I start out in reading these cases as you did that the Government had the burden of proving likely source of income and the more I read the less I was convinced that that was so. I cannot see why if the Government has to prove that in a net worth case but they do not have to prove it in an expenditure case. The expenditure system just seems to be a very sloppy way of proving a net worth

MR. MURPHY: There are cases, your Honor, which hold that the expenditure system must start off with a net worth.

THE COURT: That is true, they must have a starting point. Nobody argues in this case here Mr. Gay, like his mortgages which all checked out, there was no argument about that. There is no argument about what money he had in the bank; no argument about the fact that he had some stock at the time. The only argument we have is about whether or not he had this cash hoard so that as far as starting point the Government has at least prima facie you start with a starting point.

MR. MURPHY: Yes, sir.

THE COURT: What about likely source? Why don't you have to show there is a likely source? You see, we have the strange situation here where Mr.,- all of a sudden you have this additional tax due which goes from '67, '68, '69 and '70 from five, six, twenty-three, twenty thousand dollars.

During this period of time you have Mr. Gay going about his usual employment. In the evidence there is nothing else to show where these moneys came from. Don't you have to show the jury that arguably he had some other means of getting money?

MR. MELLENGER: No, you don't, your Honor. Under the Pinocy case and also that Massiah case what it is you either have to show a likely source of the income and show that it more than likely did not come from a prior year or negative the fact that all these expenditures came from a prior year, and once you negative the possibility of the expenditures from a prior year, then there is no likely source required.

THE COURT: You say that is what, is it Pinocy?

MR. MELLENGER: Pinocy, yes.

THE COURT: What about the Supreme Court? Has this been up to the Supreme Court?

MR. MELLENGER: Pinocy cert was denied. I sent up a memorandum of law to you Friday afternoon and I also sent one to

Mr. Murphy and unfortunately I don't have a copy with me at this point.

THE COURT: That is all right.

MR. MELLENGER: Cert was denied in Pinocy.

THE COURT: I remember that. The Supreme Court, as they did in Holland and in those cases they talked about likely source.

MR. MELLENGER: Well, Massiah also they talked about likely source. They said as long as the non-taxable sources were eliminated, then a likely source is not necessary.

THE COURT: That is true, but it is hard for me to grasp. Maybe it comes down to this; how are you going to disprove that Mr. Gay did not have these moneys from beforehand? How are you going to disprove that his story was wrong? Simply because he told the agent that he had a couple of thousand dollars at the starting point?

MR. MELLENGER: That is a starting point, your Honor. However, I think from the abundance of documents in the evidence and the abundance of testimony, the jury could easily infer, which I intend to bring out in my closing statement, that this is just not a man who is going to keep $110,000 laying around in a box. His whole source of income was investments. You look at the returns in evidence and there is just a nominal printing income and everything else from investment. It is inconsistent to say that an investor, a person who obtains his livelihood from investing is going to keep this amount of money laying around.

THE COURT: I see, and then of course the agent asked him about mortgages and he told him about the mortgages he had with people not in the family.

MR. MELLENGER: Right.

THE COURT: But did not tell him about family mortgages.

MR. MELLENGER: And we have the agents specifically asking him about family mortgages which he denied.

THE COURT: Let me do this, let me step off a minute and look at the Ford and the

Pinocy case again so when I come back, Mr. Murphy, I will be able to tell you exactly which way I am going to charge.

MR. MURPHY: May I add just one further thing, your Honor. The cases impose upon the Government the duty of investigating leads. Now, I don't think the U. S. Attorney can quarrel with that. Any leads that are given by the taxpayer, the IRS must investigate and exclude them as possible non-income sources. With that in mind, your Honor, we have here in this case one agent saying that Mr. Gay told him the most cash he ever had on hand was $2,000 which the expert then on his charts indicate that every year he gave him a $2,000 cash on hand starting point. Now, we also have Agent Quinn saying in one of his interviews Mr. Gay told him, - told him that sometimes he gave mortgages out in cash and there isn't a mortgage in the whole trial that is $2,000 or less.

THE COURT: That is jury argument.

MR. MURPHY: Yes, I understand that, your Honor.

THE COURT: You start off talking about leads. Are there any leads that he gave that you say that the agents did not follow through on?

MR. MURPHY: Certainly. The fact he gave out cash mortgages to the various people that were out here.

THE COURT: They went through all the people that he gave them the names.

MR. MURPHY: I am sorry, your Honor, I beg to differ. They did not.

THE COURT: Are there others that he gave mortgages to?

MR. MURPHY: Well, the witnesses are brought in here. They didn't go to all those people.

THE COURT: No, but they had the records from all of them, didn't they?

MR. MELLENGER: Yes, your Honor.

MR. MURPHY: Yes,they had the records, your Honor.

THE COURT: Well, Mr. Murphy, look --

MR. MURPHY: I am sorry.

THE COURT: As far as cash is concerned, for heaven's sakes, a fellow can go down to the bank and cash a check for $5,000 and then come in with the cash.

MR. MURPHY: I agree with that, your Honor, but by the same token at the very same time, the very same time they had all of his bank records to determine whether or not that was a possibility.

THE COURT: Again, that comes to jury argument, because if you say it must be from cash because there is no withdrawal, these are all the accounts, the Government doesn't say he has any additional accounts and therefore it must have been from a cash hoard because there are no withdrawals from any banks of large sums of money at or about the time the mortgage loan was made.

MR. MURPHY: Yes, your Honor.

THE COURT: The thing there is to take one step further, and again this is jury argument, that if these were for prior years in the '60's you are correct, the burden is upon the Government to look into this and to determine whether or not there were withdrawals from bank accounts of large amounts of cash contemporaneously with the mortgage loan and if that was not done, I would think it is clearly fair argument that the Government again has the burden of proving beyond a reasonable doubt that these moneys did not come from a cash hoard and it is part of the argument.

MR. MURPHY: Yes. Thank you, your Honor.

THE COURT: If the Government, - again if there is some appropriate charge on this that you want me to give, I will consider it, but otherwise I would simply leave it on the general charge that the Government has the duty and the burden of checking out likely sources, likely leads where the man says, "This is non-taxable".

MR. MURPHY: All right, your Honor.

THE COURT: Mr. Mellenger?

MR. MELLENGER: Thank you, your Honor.

THE COURT: Let me step off.

(Recess taken at 2:22 p.m.)

* * * *

PROCEEDINGS: After recess, 2:50 p.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury not present.)

THE COURT: I do not know whether this clears it up or not, but in looking at United States against Pinocy, 452 F.2 217, the way the court left it was this, "In conclusion then, the requirement that the Government establish a taxable source does not mean that the exact origin of the expenditures must be put into evidence and proved beyond a reasonable doubt. The requirement means only that the Government must prove that the expenditures did not come from a tax exempt source", so in this case it seems to me that we will leave it in the middle ground and leave it like that and you both, of course, Mr. Murphy, you are free to argue that what that means is that the Government has failed in their burden because they have proven nothing, no other income during this year in question and it is their burden to make an explanation and, of course, you have your other arguments about the loan made earlier, the money available earlier and the other items in the case which points to the conclusion that you feel the jury should follow.

MR. MURPHY: Thank you, your Honor.

THE COURT: Have the jury come up, please.

Are you going to use the other charts?

MR. MELLENGER: No, just this one, your Honor.

(Jury returns to the courtroom.)

THE COURT: Ladies and gentlemen, we are now ready to continue with this case. The next step this afternoon is that we will hear the summations of the attorneys regarding the testimony you have heard. Keep in mind that their summation is not evidence. It is again a guide to you to help you in your consideration. After the summations, I think it is best if we break until tomorrow morning and I will charge you on the law at that time. Listen carefully to the lawyers, however, because they certainly have thought a good deal about this lawsuit and the things which they feel are important for you to think about when you are considering the merits or demerits of this case.

Mr. Mellenger, when you are ready.

MR. MELLENGER: Thank you, your Honor.

May it please the Court, Mr. Murphy, ladies and gentlemen of the jury:

It has been three weeks to the day since you people have been impaneled as a jury to hear United States of America vs. Joseph J. Gay. It has been a long case. You have heard numerous witnesses come in and testify in front of you, approximately thirty. Twenty on behalf of the Government and approximately ten on behalf of the defense. You have heard testimony about numerous documents, somewhere in the neighborhood of one hundred sixty, one hundred seventy documents are now in evidence.

The purpose of a closing argument

or summation is to go over all of that evidence with you. Remember we gave an opening, we told you where we were going, presented the evidence. Now we are telling you where we have been, so to bring all the evidence together into that picture, so to speak, to show how the evidence fits in and supports the charges against the defendant Joseph Gay.

At this point I would again like to review the charges with you. They are that the defendant Joseph J. Gay willfully attempted to evade and defeat a large part of the income tax due and owing by he and his wife to the United States of America by causing to be filed false and fraudulent income tax returns on behalf of both he and his wife wherein he substantially understated their income.

Count 1 charges him with doing this in 1967. Count 2 charges him with doing this in 1968. Count 3, '69; Count 4, '70, and Count 5 in 1971. These are the charges which the Government has the burden of proving beyond a reasonable doubt.

Now, as you have heard from the opening statements, the Government has chosen what is known as the expenditures method of proof. This is what is known as an indirect method of proof vs. a direct method. A direct method would be where you could identify the defendant working for a certain company, like in this case you heard the defendant worked for South Park Electric. If the Government can show he received wages from South Park Electric and did not show those on his return, it would be direct evidence. If the Government could prove that the defendant had a certain stock transaction, a sale of stock in which he had again which was taxable and we could show he sold this stock and did not report it on his income tax return, that would be a direct method. Here we have an indirect method and what do we have. We show what he spent, what he reported and what he explained away as non-taxable sources. We deducted from what he spent what he reported from his non-taxable sources and we are still left over with an amount of expenditures.

The Government then has the burden of eliminating these expenditures as being from non-taxable sources and once this is done, you can make the inference that this excess of expenditures over amount reported and non-taxable sources is taxable income and you can make that inference that this is a taxable amount to the defendant.

There is some traces of evidence in this case as possibly where this income came from. We know he had a printing business. You could speculate that this income came from the printing business. There was a hint of testimony that the defendant may have been in partners at one time in Gay's Lounge with his brother. I believe Lorraine Russo testified it was her understanding they were partners at one time but the defendant denies this and again this is just a hint, just speculation. It is not the Government's burden to prove beyond a reasonable doubt where the income came from. That is an important concept to keep in your minds.

As was stated in my opening, the Government has the burden of proving three elements. The first element, that there is additional tax due and owing by the defendant and in a substantial amount. Okay, the defendant owed income tax.

Second element, that the defendant knew there was an additional tax due and owing and in a substantial amount. If he didn't know he owed the tax, then the Government, - then he would not have committed the crime of income tax evasion. We have to prove that he knew that he owed this tax.

Finally we have to show there was a willful attempt on the part of the defendant. Again, we are not prosecuting anybody for making a mistake, an innocent mistake or not knowing what he is doing. It has to be willful and it has to be knowledgeable on the part of the defendant. Let's look at this first essential element which the Government has to prove, substantial additional tax due and owing. Well, what proof do we have of this? Ladies and gentlemen, that proof is before you right up there in black and white.

Look at the year 1967 and what is the additional tax due and owing in that year, - $5,204. The year '68, $6,306 additional tax due. 1969, $23,750; 1970, $20,812, and finally in 1971, $15,362.

There is one thing should be brought to your attention at this point. The Government has the burden of proving a substantial amount of additional tax due and owing. The Government does not have to prove this to the exact penny. It has to be a substantial amount but you may find that between these figures and the figures in the indictment there may be some discrepancies, a few dollars, a few pennies. That does not mean that the Government has not sustained its burden of proof.

You have sat here during this whole trial and you have heard all these figures go in and you have heard all the source documents come in, the people from Loeb, Rhoades, the Shields Company, the banks. They brought in certain documents and testified to this document and Mr. Russo who is seated in the back of this courtroom, he interpreted these documents for you and he came up with these conclusions.

Let's take a brief look at the work Mr. Russo did. Now, you people heard all this evidence come in. You have heard Mr. Russo summarize all this evidence and at this point I am not about to go over this a third time. It is unnecessary, but in the event that you people go down to the jury room and start your deliberations and have any question about these figures, I am going to show you where they came from and how you can work back into them.

Now, basically, Mr. Russo testified that this and the other two charts which are on the easel, the sources of funds and the expenditures of funds were a blow-up of Government's Exhibit Number 159 and that is basically a summary schedule. Take a look at Government Exhibit 159 when you are in the jury room and right here in the left-hand corner is a column entitled "Government Exhibit Number". If you want to find any figure on here, you can look at that figure, go over to the left-hand column and find the Government Exhibit number and go to that exhibit and find that figure.

Year one, $30,517.49. You go over Government Exhibit 141. Government Exhibit 141, you look under the year in question, December 31, 1967, $30,517.49. Now, where did this figure come from? This is a total of a whole column of figures.

Again you go over to the left-hand column, take a look at the Government's Exhibit number and that will take you back to the source document. Government's Exhibit Number 141 is an analysis of bank balances and cash on hand for the years ending '66 through '71.

Go back to find one of these figures, say, Government Exhibit Number 17, what is that? That is a transcript of a savings account or a checking account, so each one of these figures in Mr. Russo's summary can be worked right back to the source document as brought in either by the banker or the stock broker or whoever else happened to bring in a document and testify. It is not very complicated at all.

Let's take another one just to make sure that you understand how to work back through these figures. The next line for the year 1970 shows expenditure of funds for $179,396 for purchase of Government bonds; reference

145. You look at Government Exhibit Number 145. Look at the total, $179,396.24. That's where that figure came from on this schedule. Where did this figure come from? Well, you notice a number of figures of which that is a total. Again you go to the left-hand column, Government's Exhibit Number 64. Now, what is that? That is a receipt from Marine Midland Municipals Corporation and that is where Mr. Russo got that figure from.

Next figure, wonder where that figure came from which is for the purchase of some New York City bonds due in January 1st, 1980, Government's Exhibit Number 65. You look at Government's Exhibit Number 65. Again you will find a receipt from Marine Midland's Municipals Corporation. If you have any question about these figures, where they came from, and whether they are in evidence, you have the time and you can take the time down in the jury room to trace back from the summary schedules to Mr. Russo's schedules back to the original source document.

That is with the exception of two figures in the summary schedule. One figure shows a purchase of a Treasury Note in 1970 in the amount of $10,000. Okay. Where did that figure come from? That figure came from Mr. Quinn's testimony. He told you that during one of the interviews with the defendant, the defendant told him that his wife had some money stored in a mattress. Now, Mr. Gay took the stand and says he never told him that but he did tell him about $10,000 in any event which his wife had all of a sudden told him about. Mr. Gay told Mr. Quinn that he took that money to purchase a Treasury Note and that is where the $10,000 expenditure came from on that schedule.

The other figure that won't go to a source document, you remember Mr. Gay purchasing a new car from Hank Bokman. There is a stipulation read in evidence. Well, Mr. Quinn asked him what happened to the old car and he told him he sold it to a friend for a couple of hundred dollars. Okay, so in the sources of funds you will find a $200 source of funds in 1969 for the sale of that car to an old friend for a couple of hundred dollars. Every other figure in this schedule can be traced to a source document and again, if you have any question about where these figures came from, feel free to trace them. They are all in evidence, ladies and gentlemen, and again it is important to stress that the Government does not have to prove the tax due and owing to the exact penny. They just have to prove a substantial amount and, ladies and gentlemen, the substantial amounts are there.

What is the second element the Government has to prove, - knowledge on the defendant's part of a tax due and owing in a substantial amount. Basically the defendant had knowledge of the first element that tax was due and owing.

Well, how do you prove knowledge? We can't walk over and unscrew the top of Mr. Gay's head and look inside and say "There is knowledge that he knew the tax was due and owing." You can't look inside a person's head to find out what they know or what they don't know. Again you're going to have to infer things. You can look at the facts and circumstances surrounding the defendant and infer what he knew. I will give you an example of this. Supposing a man is walking down a beach with bare feet and he comes to a portion of the beach where there is all kinds of broken glass and he stops and walks around the glass and continues walking. Well, you can infer from his actions that he knew the glass was there. How? Because he took acts to avoid it. He stopped, walked around it and then continued walking, so from the facts and circumstances of this case you can infer the knowledge that the defendant knew there was a substantial amount of tax due and owing and what are these facts and circumstances? Well, who was primarily responsible for preparing the defendant's income tax returns? Well, you know that he had one preparer by the name of Francis Kuras and another by the name of Ted Willis and where did they get their information to prepare their returns from; - the defendant gave them the information. He went through all his forms he received from his banks, his interest, his dividends and he made a determination as to what was taxable and gave them to the accountant. He went through his checking account to find out all expenses for his printing business, went through his receipts book, found out what receipts he had and made a determination as to the income from his printing business so you know that the defendant had at least some knowledge as to taxability of income when he supplied his accountants with all the source information for preparation of the returns.

What else do we know about the defendant? He knew a lot about financial matters. This man was an investor and if you will look at his income tax returns as filed, you will see that even on those returns the primary source of income is always investments. It is not printing. This man had a knowledge about financial matters and take a look at the figures over here. Here we have a man who supplies a source to his accountants for preparation of his returns and we have a man who is an investor, knows a lot about financial matters. In 1967 he had expenditures in excess of funds of over $16,000; 1968 expenditures in excess of funds of $18,000; 1969, over fifty thousand; 1970, forty-six thousand. In 1971, thirty-five thousand.

Ask yourselves, ladies and gentlemen, did this man know there was a tax due and owing on this amount. I submit to you he did.

Let's go to the last element the

Government must prove beyond a reasonable doubt, a willful attempt to evade or defeat the income tax due and owing the United States. Government's Exhibit Number 4 which is his '67 return; Government's Exhibit Number 5 which is his '68 return; Government Exhibit Number 6 which is the '69 return; 7, the '70 return, and 8, the '71 return. This is where the attempt was made for each of the years in question in filing the income tax return and understating his taxable income, right there in those documents, ladies and gentlemen.

Well, how do we know about the knowledge? Again, you just have to look at the amounts and how do you know the attempt was willful? Ladies and gentlemen, we have a consistent pattern of understating his taxable income for five consecutive years in a row. From this you can infer that the attempt was willful.

What else do we have? Well, remember Mr. Krysztof testified that the first time he ever met Mr. Gay was December 28, 1971. You remember that, and what did he tell him as soon as he met him, - that Mr. Gay was under investigation for criminal violation of the income tax laws. December 28, 1971.

When you are in the jury room, look at Government's Exhibit Number 8 which is the 1971 tax return and look at the date that was filed, April of 1972, four months after the criminal investigation began. Ask yourself whether the understatement of income was inadvertent, and there is another factor you should take into consideration. How did this man handle his affairs? We know he is a very successful investor. We know he is a businessman. He has a printing business and you know he has a checking account. Well, all his cancelled checks are in evidence at least for the years in question. Take a look at those. Most of his large expenditures never came through that checking account and what is a check, a check is a business record for the payment of money which will come back to the defendant and become part of his records and how did he handle his affairs, - bank drafts.

Now, what is a bank draft? A bank draft is basically a cashier's check which a bank will issue. A person takes it and pays somebody with it and where does that draft go after it clears, it goes back to the bank. It becomes part of the bank's business records, not the individual's business records, and again what other ways did the defendant have of handling his affairs, - cash, no record whatsoever, no record traceable back to the defendant.

You can infer from the consistent pattern of understating and the fact that the one return was filed four months after he was informed of the criminal investigation against him and also the way he handled his affairs that the attempt was willful to evade and defeat income tax.

Let's take a closer look at this expenditures theory of proof. As you remember, I said to you a little while ago that the Government does not have to prove the exact source of these expenditures but that the Government, if the Government doesn't prove this, they have to prove something in the alternative and that is that these expenditures did not come from a non-taxable source.

The Internal Revenue agents have an obligation to go out and check every non-taxable source. Well, what did the agents do in this case? They interviewed the defendant a number of times, four times you have heard testimony about. During the course of these four interviews the defendant had told them about a number of non-taxable sources. The defendant told them about mortgages. When a person repays a mortgage a certain portion of that will be principal and a certain portion will be interest. The repayment of principal that the defendant would receive during the years in question would be a non-taxable source of funds. They got the mortgage sheets from the defendant and then what did they do? They went to the Erie County Clerk's office and they got Government's Exhibits 97 through 106. What are these? These are certified copies of the mortgage instruments filed over there and you can even look inside and see the certification from the County Clerk. They went and checked, verified these, these non-taxable sources to make sure that the defendant had what he claimed he had.

Inheritances, - they ask the defendant about inheritances and what did he tell them? He told them he received a few thousand dollars a couple of years ago when his parents passed away, when his father passed away, and what did the agents do? They contacted Leonard Gaj. Remember Mr. Gay testified about the money left by the death of his father and the death of his mother.

They verified what the defendant told them. They double-checked it.

They asked the defendant whether he cashed the savings bonds during those years. The defendant said, "No", and what did the agents do? Well, they contacted the Bureau of Public Debt. Remember there was a stipulation read in to that effect to see whether any savings bonds were checked. They verified what was told to them.

Another non-taxable source, insurance proceeds. Now, they asked the defendant, "What about insurance proceeds, did you receive any settlement, any awards, any insurance payments during the years". Well, the defendant told them about two insurance settlements. Number one, a settlement on behalf of his wife because of a traffic accident she had. Okay, who settled that for him, - Crucian Messina. The agents went and checked with Mr. Messina and remember Mr. Messina testified that this was not during the years in question, '67 through '71. The payment was actually made in '65 so this was not given to the defendant as a non-taxable source for the year in question. It happened before the beginning of this period, and the second item of proceeds the defendant told them about was the robbery in '69. You remember that. Well, the agents went and checked about that and you can see that there is verification of the robbery and the proceeds received from that robbery on the defendant's 1969 tax return where he claims it as a deduction and there is also a cancelled check brought in by Mr. Walter Herr of the Buffalo Savings Bank, a photocopy, which was deposited in the defendant's account from the Gulf Insurance Company for $1,394, the proceeds from that insurance settlement for the robbery. Again the agents checked it out.

What other non-taxable sources did the defendant tell you about? Well, Agent Quinn told you that Mr. Gay told him he had $11,000, or his wife had

$11,000 accumulated in the mattress. Again Mr. Gay took the stand and he denied the fact that he told them it was in the mattress. He said it was behind a night stand in the bedroom, but in any event, it is the amount which is a non-taxable amount. Well, could this be verified by the agents? It could not, so what did the agents do with this? This was given to the defendant as a source of non-taxable funds in the calculation and again if you look at Government's Exhibit Number 141, this is an analysis of bank balances and cash on hand and you will see the $11,000 given to the defendant as a source of funds. They could not dispute what the defendant told them so they took his word for it and gave him full credit for it.

What about other non-taxable sources? Well, you have learned during the course of this trial that the defendant had some municipal bonds. Interest from these bonds was non-taxable.

That is not included on the return but it doesn't have to be, but that is allowed to the defendant as a non-taxable source.

There is also some dividends which are reported on the return which, for one reason or another, are non-taxable, either exclusion of dividends, $200 exclusion on behalf of he and his wife, or for some reason or another had been decided to be non-taxable and he doesn't report that correctly. It is reported on his return but not included as part of his income. That is allowed the defendant as a source.

Remember the testimony about the redemption of the Treasury Note. That is also given to the defendant as a non-taxable source. Security sales, well, if you sell a security which you paid $75 for and sold it for $100, the only taxable portion would be the $25 profit, but the whole proceeds would be a source of funds to the defendant, so you heard Mr. Russo say that he went back to the return and dug out the full amounts of those proceeds allowable to defendant as a non-taxable source of funds.

Another source of funds, bank withdrawals. Any money which the defendant withdraws from his account and makes some expenditure with would be made from a non-taxable source. Well, that was all taken into account by Mr. Russo when he made the analysis of increases or decreases in bank balances. He took the year-end balances, if you remember, and added them all up and subtracted out the total year-end balances from the prior year. If there was an increase, that would be treated as an expenditure.

However, in one year, 1970, there was a decrease and that was treated as a source of funds. Actually what had happened is the defendant is spending funds during that year which he had withdrawn from his account.

There is even some testimony as to the agents finding some sources of funds which were taxable. However, which were not included on the defendant's return and you heard about some small amounts of mortgage interest which were overlooked, the $120 a year from Selective Enterprises which Anthony Glieco testified about and there are also some more substantial amounts, the Treasury Note when it was cashed in, $700 in interest due on that and also the Federal Intermediate Credit Bank bonds.

Now, you heard Mr. Glenn Roll testify that this amount was taxable for federal purposes and the amount received was $3,200 in 1970 and over $6,000 in 1971 and they asked the defendant about this and what did he say; - didn't know it was taxable, overlooked it, didn't receive a 1099, a from from the company telling him he had to include it in his income tax returns, so how did the agents treat this? They allowed this as a source of funds. Now, you have to keep in mind anything that the agents allow as a source of funds is not part of the taxable income which is alleged by the Government that the defendant evaded.

The source of funds, the higher that figure is, the more it reduces the gap between the sources and the expenditure, so if you include an amount in sources it is going to reduce the gap of unexplained expenditures and remember we were saying we are not trying to convict somebody for innocent mistake or inadvertence or overlooking something.

The defendant said, "I overlooked these amounts. I didn't know they were taxable", taken at his word. Allowed as a source of funds, no question about that. He is not being charged with those amounts.

Likewise you heard some testimony about some dividends that weren't reported. The same thing. The agents investigated every lead which the defendant gave them, even found some that he didn't give them and allowed them as a source of funds. After all this investigation, what are we left with? We are left with $16,000 unexplained expenditures in '67; eighteen thousand in '68; over fifty thousand in 1969; forty-six thousand in 1970 and over thirty-five thousand in 1971.

Look at those figures, ladies and gentlemen. How can the defendant overcome those figures? How can he defeat those figures? There is a way, there is one way. To come up at this point and show that these came from non-taxable sources, cash on hand, cash which he had on hand before the indictment years; possibly repayment of loans which he made before the indictment years which are now coming due during the indictment years. That's how the defendant can defeat those figures and you have heard testimony about cash on hand and also about loans made prior to the indictment years which were being paid back a little bit during the indictment years and you think about it, ladies and gentlemen. This is the real issue in this case, whether that cash on hand existed or did not exist as of 12-31-66; whether the defendant had made these loans as he claimed or whether he didn't prior to the indictment years, and let's take a good strong hard look at this issue.

Before we do, though, there is two things you should be aware of and two things you should keep in mind. Number one, just because a witness has testified in front of you, you do not have to believe every word that witness has said. You can determine what is known as the credibility of witnesses and among the things you can consider in determining credibility of witnesses is what interest they have in the action, if any, and also their demeanor as they testify on the stand in front of you. Now, demeanor means how they act on the stand and most people who come and testify do not testify every day. They come in here and they are a little bit nervous. Admittedly almost everybody coming in her to testify was a little nervous, but just think if some witnesses were a lot more nervous than others and that is what is meant by demeanor.

Another point which should be brought up before we go to this alleged cash on hand, there are three things you can take down to the jury room with you for your deliberations. Number one is your recollection of the testimony. Number two, all these exhibits which have been moved into evidence and the Court has accepted into evidence, and the third which is very important is something which you walk in this courtroom with and which you will walk out of this courtroom with and that, ladies and gentlemen, is your common sense. You can look at all the evidence in this case interms of whether or not it is reasonable.

With those two things in mind, let's look at the alleged cash on hand

and the alleged loans made prior to the indictment years. When was the first time you heard about this, this $100,000 hidden away in the basement; when is the first time you heard about that? Well, was it when Mr. Krysztof testified about the interview on December 28, 1971 when he asked the defendant about cash on hand, - what did the defendant tell him at that time? He didn't say, "I have got a hundred thousand dollars down in the basement". No. He said, "It depends. It depends on savings account withdrawals, payments I have received on mortgages, dividend checks I have received. It depends on a number of factors, couldn't tie it down". He said nothing about this $100,000 down in the basement, and ask yourself what the defendant was talking about. Was he talking about an amount he may have had in his pocket at that point when he was talking about savings accounts and withdrawals received; was he talking about amounts of cash around the house with ready access and not on deposit. You didn't hear about the $100,000 during that interview.

How about a few months later. Again Mr. Krysztof testified he asked the defendant about cash on hand. This time he pinned the defendant down to $2,000 figure. The defendant said, "I never had more than $2,000 on hand". He didn't say a hundred thousand dollars, he said $2,000. Okay. Well, the defendant takes the stand and he says, "Well, I thought he meant cash in my pocket. I didn't know he meant cash lying around the house." Ask yourselves is that consistent with the prior definition of cash on hand and also you heard Mr. Krysztof testify that he defined it for him, he meant undeposited cash laying around the house, in your pocket, in a dresser drawer, anywhere. All of a sudden the defendant's understanding of cash on hand is money he had physically in his pocket.

Have we had any other testimony

about cash on hand? Well, what about Agent Quinn. It is money that is in the mattress and out of the mattress. What about that money? What, in effect, are they talking about, irrespective of whether it was behind the dresser or in the mattress. They are talking about $10,000. What are they talking about? They are not talking about cash in Mr. Gay's pocket. They are talking about cash on hand, ready available cash. The $100,000 did not come out then either. Well, where did you first hear about this? You heard about it from Mr. Leonard Gaj. Who is Mr. Gaj? He is the defendant's brother. Do you remember me asking whether he is close with his brother on direct examination and Mr. Gaj said, "Yes, very close". There has even been some testimony that he may have been a business partner in Gay's Lounge. That is disputed and it is really not important for the purposes of this trial, but they have a very close interest. When did he first see this money, - back in 1956. Brother Joe came trotting up from the basement with a little tin box, granted him a mortgage loan, $15,000; opened the box to take this money out. Mr. Gaj, Leonard Gaj being a banker, glanced at it. He has seen $100,000 before and knew right off it was $100,000 that was in that tin box. Didn't count it, just glanced at it, $100,000.

Look at that in your common sense, ladies and gentlemen.

Also consider Mr. Gay's demeanor when he started talking about this $100,000 in the box. Consider how he reacted when he was testifying and I submit to you you will find his demeanor changed when he got into this $100,000 testimony.

Another thing which should be mentioned about Mr. Leonard Gaj while we are on that subject, although it will be more fully developed later, testimony about the mortgage loan which he received from his brother, the $15,000 which he received in '56 and later on in 1960 when he sold the house he paid it back. Remember Mr. Gay, Mr. Joseph Gay getting on the stand and saying, "Well, my brother came to me with this schedule of repayments and all the interest and everything like that", and he said "Well, I will grant you the mortgage and save you the closing cost", and remember his brother charged him interest. This is his own brother who Mr. Gay says he is very close to which becomes important when we get to Mr. Sam Russo who is not related to the defendant who received an interest-free loan.

Where else have we heard about this cash hoard in the basement? Well, we have the defendant's daughters, Dorothy Hobart and Lorraine R[illegible]o. Did they say they never seen this tin box? Neither one testified as to ever having seen it. Presumably they grew up with the defendant and lived in the same house, but they never seen it. Did they testify as to the amount which was around the house? No. They testified that their parents took a yearly trip and on a number of such occasions the defendant mentioned to them, "If anything happens, look around the house and you will find money". Now, they could not say whether it was $100,000 they would find or $1,000. Just, - the defendant told them, "Look around the house and you will find money", so you don't know whether at that time the defendant was referring to this cash hoard or just a nominal amount he may have had around, the $2,000 he testified to earlier.

What else did his daughters testify to? Well, Dorothy Hobart testified that she received a $15,000 mortgage loan from her father in 1965 prior to the indictment years; received it in cash and she received this money and she was pretty nervous abot it, didn't like carrying $15,000 in cash around with her. The first thing she did is went and got a bank draft. Just in passing, ask yourselves whether it is logical whether she should take this money from her father, possibly whether she would say, "Dad, I don't want the money, hold the money and give me a bank draft. I don't want $15,000." Just ask yourselves that question in scrutinizing this evidence.

Also she testified that there were possibly some payments made on this mortgage in '67 during the indictment years but there were no payments in '68 or '71 which may become important later. She also testified there was still $10,000 outstanding at this present time.

One thing she did testify to about this loan which is very interesting, there is no interest on it and there is no instrument signed or filed. Nothing signed. There is no record of it. Consider Dorothy's demeanor on the stand also.

Now, let's turn to Lorraine Russo. She basically testified to the same things as Dorothy Hobart and also her husband Silvio Russo except one minor thing. She thought that her father was partners with his brother in the tavern. She said that they opened that tavern together and at some point in the early '60's Leonard bought her father out. Just something for you to ponder, a discrepancy in the testimony between Leonard and Joseph and his daughters. It is just interesting to note at this point.

Well, how about Silvio Russo, what do we know about Silvio Russo? He is the defendant's son-in-law. He is also the president of South Park Electric. He is a businessman. He has a degree from Canisius College in Business Administration. He is a well-educated man, president of a corporation. Incidentally, a corporation which the defendant happens to own an $80,000 interest in. That is interesting.to note, and what did Silvio have to testify about? Well, first got married back in '62, went over to his father-in-law's house for the purpose of obtaining a mortgage loan. His father-in-law walks in the living room with a brown paper bag. Inside this paper bag $13,000 cash; $13,000 cash contained in a paper bag. On cross examination I asked him, "Mr. Russo, did you ask your father-in-law where he got this money from? No. Why not?" It wasn't his business to ask his father-in-law anything.

Well, what do we know about this loan? Well, is there a loan instrument signed or filed like the other ones? There was not. Was there any interest on this loan? There was not. What about repayment of the loan, what form was this loan paid back, - always in cash. "Well, Mr. Russo, you are a businessman. How do you normally conduct your affairs, - check. But you paid this loan back in cash? Yes Why? Received it in cash, paid it back in cash. Did you ask your father-in-law whether he wanted it paid back in cash or check?

No, just assumed. He gave it to me in cash, he wanted it back in cash". Ask yourself about that.

What else did Silvio Russo have to tell you? Well, he testified about his father Sam, - Sam Russo. What did he say about him, - Thanksgiving 1967, whole family is over to his house. His father wants to buy the hole in the donut, the piece of property surrounded by the two pieces of property he already knows. He happens to be talking about it, tells the defendant he has got an opportunity to pick this up for $22,500. Well, what happens, a couple of weeks later Mr. Gay very graciously goes forth and gives this man $20,000 to purchase this property. Ask Mr. Russo when this was paid back. He said $10,000 in '68, $10,000 in '69. "What form was it paid back, cash or check". He didn't know. "Are you aware of any instrument being signed evidencing this loan?" Yes, he was. His father Sam Russo insisted that his father-in-law take security, some note on property on a summer home or something like that. "Well, Mr. Russo, where is this instrument right now? Well, I was executor of my father's estate and when he died a few years ago I found it amongst his papers and destroyed it". That instrument is no longer in existence to this day, ladies and gentlemen.

What else did Mr. Russo have to testify about? Well, he alleges that in 1969 after the robbery, he went down in the basement, his father-in-law called him down and said, "They may have gotten some money but they didn't get everything. They didn't get what they were looking for", and he alleges his father pulled out a tin box at that point, $110,000 in cold hard cash, fifties and hundreds, $5,000 packages laying right there in front of his eyes. I asked him on cross examination, "Well, did you ask your father-in-law where this money came from? Oh, no, none of my business to ask my father-in-law anything". Think about that, ladies and gentlemen.

Let's look at this cash and these loans. Now, you know that on a number of previous occasions the revenue agents, Mr. Quinn and Mr. Krysztof asked about cash on hand, - never came out; asked about personal loans. Mr. Quinn asked the defendant about personal loans to members of his family. These loans never came up then; asked the defendant to supply him with a list of all principal repayments which he may have received during the indictment years. Well, those never came up then. When did they come up, - now, during the trial.

Now, let's take a look at something else too, all the loans which the agents were told about during the initial interviews. Capable of varification, right there in black and white, ladies and gentlemen. All the loans that come up now, three loans, two of them there was in evidence a document signed evidencing them. The third one there was a document. Well, where is that document? Well, Mr. Silvio Russo destroyed it as executor of his father's estate. It is no longer around.

Let's look at something else. Now, we know the defendant made a lot of loans and he always charged interest on those loans. Look through these. Start out with the loans in the late '50's, five per cent. In the '60's the loans jumped to six per cent and in '70 seven per cent. Not only did the defendant charge interest, but the going rate of interest. What is the status of interest? It is taxable and therefore it has to be declared on a tax return except for the loans to the family, the loans to Dorothy Hobart and Silvio and Lorraine Russo, Sam Russo, no interest charged. Therefore there was no record of it entered on the tax returns in any of the years in question. Think about that, ladies and gentlemen.

Let's look at Mr. Gay's testimony

now. Look at the beginning of this alleged cash hoard. Where did it all start? Well, it started with a loan from the defendant's mother-in-law back in 1939, $15,000; bought a tavern, - not the building, just the business. Two years later turned around and sold that tavern business for $20,000 and he testified that at that time he had $65,000 cash on hand. He used the term "cash on hand" which is significant. That's what he had available to him two years later. Well, if he sold it for $20,000 it means that he accumulated $45,000 over two years operating that business other than from the sale, $22,500 a year. Some of your people were employed during those years. Ask yourselves is it reasonable for a man to make twenty-two and a half thousand dollars at that point a year prior to the boom years of the war? Look at that in view of your common sense.

Let's take a look at some of the other aspects of the evidence. Let's pinpoint our attention on December 31, 1966, the day before the indictment years. Let's take a look at what the defendant owned. The Government's Exhibit Number 141 is a column December 31, 1966 listing all his bank accounts and the balances on that date. There is over $104,000 deposited in those accounts on that date. Another interesting thing is there are over fourteen accounts open before the indictment years, - December 31, 1966.

Stocks and bonds. Now, take a look at the defendant's 1966 income tax return which is in evidence and you will see him receiving a number of dividends from stocks he has investments in. Also there are a number of records of the defendant. I am calling your attention to Exhibits 123, 24, 27, 28, 30, 31, 32, 34 and 36. Remember Agent Quinn testifying that he received a number of records from the defendant. These are records of stock transactions which predate 1966. Go through these. See what was purchased prior to 1967 and what was sold.

Ladies and gentlemen, you will come up with over $70,000 holdings in stocks, purchase price of stocks which the defendant held at December 31, 1966.

Also remember the stipulation as to non-cashing of bonds. It is a document in evidence which shows when these bonds were purchased and for how much. You will see that the defendant had $13,000 in U. S. Bonds as of December 31, 1966. Mortgages receivable, you have certified copies of the instruments in the record in evidence. We also have the defendant's mortgage statements, balance owing as of such and such a time. Look at those, add those up, 12-31-66. How much did he have invested in mortgage loans, - over $30,000, ladies and gentlemen.

Prior to the indictment years the defendant had over $225,000 in investments prior to any of the years in question. Look at his tax return and you will see primary source of income shown on those returns was investments. Ask yourself is it reasonable that an investor is going to leave $100,000 sitting around not gaining income.

Also consider the printing income shown on the returns, never amounted to more than $1,000 for any of the years we have returns for; always less than $1,000.

Consider the defendant's statement on the stand that he was afraid of banks. Yet, before the indictment year he had over fourteen accounts, over $100,000 in bank accounts. Some theory he had of banks. I submit to you, ladies and gentlemen, he wasn't afraid of banks.

Also consider something else. All these mortgage instruments from the Erie County Clerk's office. Everytime he lent money he had some evidence of it. He was protected. He filed the thing where it should be filed in the clerk's office. If a person is going to take such steps to protect his interest and with people he has known thirty years or all his life, is this the type of person is going to leave $100,000 laying around in his basement?

Consider Government's Exhibit Number 19, the certificate of deposit for $25,000 issued from Marine Midland; date of issue, April 16th, '67. It is good for one year. Look at the year it is cashed, April 17, 1968, exactly one year to the day from the time it was issued. Look at the notation on the back, "To gold passbook account". This man did not lose one day's interest on this money. He went right into a high interest account. Consider that when you are thinking about the $100,000 in the basement.

Also Government's Exhibit 20-1, 25, 26 and 28, deposit tickets, notation, coupon deposit going in; notation coupon deposit going into the accounts, coupons going into the accounts, - coupons.

Remember Mr. Glenn Roll from Marine Midland Municipals who brought in a statement of what the due dates were of the interest coupons on municipal bonds That statement is Government's Exhibit Number 69. Compare that with the dates of these deposits. As soon as this man got these coupons, they were deposited right into the savings account. They didn't wait around for a period of time.

Also the defendant stated that he would like to have cash on hand, "I like to have it around". Look at Government's Exhibit 20-2, deposit $3,000 cash; Exhibit 30, deposit $1,000 cash; Exhibit 32, another deposit for $1,000 cash; 34, $1,500 deposited in cash; 36, another $1,500 in cash. Go to 42, another thousand dollars. This man is not afraid to deposit cash. He didn't keep it around. He put it in his bank every opportunity he had, and look through some of these other deposit tickets that are in evidence and what do you see, $6, $9, $7 dividend checks going right in the bank. There are a number of these checks in evidence, and look at those and see how long they hang around before they are cashed. These things didn't lay around the defendant's house. They went in the bank where they could go to work for the defendant, earn him some money.

Remember the cross examination of the defendant, I started asking him about transfers of various accounts and the defendant told you on a number of occasions he would take money out of a regular interest bearing account and transfer it into a higher interest bearing account. This man was getting every penny he could from his capital. He wasn't leaving it in the basement.

Ask yourself another question. This man took the hundred or hundred and ten thousand dollars he had in the basement, put it to work for him, what did he get, five, six, maybe seven thousand dollars a year, something of that nature. Let's take a look at his tax returns for 1965 and 1966 which are two pre-indictment years returns. '65, the last page, itemized personal deductions, interest on loans parentheses auto financing parentheses Liberty Bank, $71.31. What is a man doing with a hundred thousand dollars in his basement taking out a loan to buy a car? 1966, Liberty Bank interest deduction $32. First of all you have a man who makes his primary living from investments wants you to believe that he has got $100,000 sitting in the basement where he is not collecting a penny income from it, and consider the inconsistency of him taking out a loan with that much money sitting in his basement. Consider that, ladies and gentlemen.

Another thing which is kind of interesting, remember the robbery in '69. Remember what Mr. Gay said about what happened after that robbery, didn't think it was a good idea to have this money around anymore. Figured it was time to start unloading it, don't leave it around; started buying investments, started investing in the stock markets. Ladies and gentlemen, he invested in the market long before the robbery in 1969. What do you think, supposing a person did have $100,000 in the basement and he wanted to start investing in the market and get rid of this money so it wouldn't be vulnerable to theft and he was to go out and purchase some municipal bonds. Where did he get this money from, - take it from the box in the basement and get rid of it. Well, look at Government's Exhibit 37, 38, 43, 45. These are transcripts of account in the Buffalo Savings Bank. Government's Exhibit 55 which are withdrawal tickets which correspond to these transcripts of the bank's, and in each one of these withdrawal tickets you see a withdrawal in excess of $8,000 and up here it says "Pay to", and what does it say, DFT, pay to DFT, pay to DFT, pay to DFT. What did Mr. Walter Herr say "DFT" meant, - draft. Well, Government Exhibit Number 54. It is a draft issued by the Buffalo Savings Bank where these withdrawals were made from, and what date, April 1, 1970, same date the withdrawals were made. What is the amount of this draft, - over $40,000. Who is it payable to, - Marine Midland Trust Company of Western New York. What happened on April 1, 1970? Well, you know that the defendant purchased a large amount of municipal bonds from Marine Midland. Now, wouldn't it be logical after this robbery for this man who is going to go and get the cash out of his basement to purchase these bonds and take it out of these accounts? Ask yourselves that.

Also October 9, 1970, what happened then? This again is the year after the robbery. Well, we know that Mr. Gay took a vacation that month and at that time he gave his alleged tin box to his son-in-law which had $40,000 in it at that time. Well, let's look at Government's Exhibits 27, 29, 31, 33 and 35. Again, transcripts of account. Government's Exhibit Number 57, withdrawal tickets, withdrawal tickets for those accounts, each one going for the purchase of a draft. The lowest amount for these withdrawals is $12,000.

You have here Octo‑‑r 9, 1970 draft. What amount, $65,000, payable to who, - Marine Midland Trust Company. What happened in October of 1970? You know that the defendant made a second large purchase of municipal bonds. This man wasn't grabbing the money to get rid of it out of his tin box. He was conducting business in the normal course.

Ladies and gentlemen, you consider all the evidence in view of your common sense. You ask yourself who has an interest in this tin box and you scrutinize this evidence and I submit to you, ladies and gentlemen, that you will conclude that the tin box did not exist and once you reach that conclusion, ladies and gentlemen, you will find the defendant Joseph J. Gay guilty beyond a reasonable doubt of the charges in that indictment.

Thank you.

THE COURT: I think it is best that we take a brief recess now, about ten minutes, and we will come back and resume the summations.

(Jury escorted from the courtroom.)

THE COURT: We will be in recess.

(Recess taken at 3:45 p.m.)

* * * * *

PROCEEDINGS: After recess, 3:55 p.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury present.)

THE COURT: Mr. Murphy, when you are ready.

MR. MURPHY: Yes, your Honor. Thank you. May it please the Court, Mr. Mellenger, ladies and gentlemen of the jury:

At the outset of this my summation, let me, first of all, extend to you the appreciation of both myself and my client for the kind attention that I know you have given to this lawsuit. It has been a long, tedious lawsuit, had many interruptions that were none of your fault nor mine or the U. S. Attorney or the Court's. At the outset, let me also say to you that in the history of my law practice, I have never purposely misstated the testimony of any witness during the course of a summation so that if my recollection of what the witnesses have testified to in this case disagrees with yours, then by all means, use your recollection as opposed to mine.

Now, I was extremely interested in Mr. Mellenger's summation because I suppose it exemplifies the feeling of Government employees today, mainly, the IRS people, the bureaucrats and all other Government employees who say, "Either you live by our rules or live by our standards, or you don't live at all", because I have seen not only the defendant in this case crucified, but his brother crucified, his two daughters crucified and he himself or his son-in-law crucified, and for what. The very simple reason that they do not live up to the standards set by the IRS.

You have been asked to recall certain testimony. I ask you to recall, ladies and gentlemen, if you will, the last question posed to Mrs. LaRusso, "Do you love your father". Here is a girl grew up, Polish home, educated at D'Youville College, Master's Degree from Canisius College, probably set up in business in a dancing school, lent $13,000, the purchase of her original home and the question, "Do you love your father". What did he expect the answer to be, but he got the answer he wanted. He got the answer that he was certain he was going to get for one simple reason, to be able to say to you, ladies and gentlemen, "Look at the demeanor of the witnesses who appeared on behalf of the defendant, did they become nervous at certain aspects of their testimony and if so, you disbelieve them", because with that tin box in the case, the Government has no case and so their attack must be upon the credibility of all the defense witnesses with the idea that perhaps these things did not happen as they testified to, that perhaps they were prearranged.

Well, let's talk about some prearrangement, if that were the case. Let's talk about what is logical in this particular case. During the course of these two girls growing up in their lifetime, the mother and father took trips. Mr. Gay did not say, "Look around the house, you will find some money", as Mr. Mellenger would have you believe. Both girls, - one girl said a substantial amount of cash. The other girl said a lot of money in the area of the attic. Now, if we were going to prefabricate the testimony in this case, the simplest thing in the world would be for these two girls to be inquisitive, go to the attic, find the tin box and count dollar for dollar how much money their father had and who could ever refute that. These girls testified to exactly what happened.

This is what happened during the course of their lifetime. They were told that a substantial amount of cash, a lot of money was hidden in the area of the attic, not specifically where it was hidden. They did not go and look. They did not go and try and find out. That's all they testified to, that there was a lot of cash.

Mr. Mellenger says, "Oh, disbelieve that because they are trying to help the father". They are willing to lie to help their father, I suppose, commit perjury. That is not the way they were brought up. It is not what happened in this case on the defense side of this case.

Now, let's go to this absolute and positive genius who is the defendant in this case. What does Mr. Mellenger say that the proof has given to you, the jury, to decide. Astute investor, astute. Ladies and gentlemen, given $65,000 in cash in the year 1941, - in the year 1941 any brokerage house in the country will tell you they could have taken that money and made you a multimillionaire today in the year 1967 through '71. Multimillionaire. I don't have to tell you that. Take your common sense. I urge you also to use your common sense. $65,000 in 1941, projected through '67 - '71, thirty years and you would have been a multimillionaire. Mr. Gay is not a multimillionaire, not even a millionaire, but what is he. At the age of thirteen in the year 1928, after eight grades of school, formal education, eight grades, he quit school and he went to work in a printing shop. In the early 30's at the age of seventeen he bought his own printing press. That's not necessarily a genius, but it is a man who is not afraid to work. It is a man who saves his money. It is a man who betters himself by the money that he has saved.

Take one step further and let's go to the 40's or '39. At that time, he is married, - Mrs. Gay, - and no one in this case claims to be a business woman, a genius in the investment of money, and his mother-in-law lends him fifteen thousand, again in cash and he buys a business, so Mr. Mellenger says, "Well, it is impossible. Go back to what you were earning in those years and it is impossible to, when you come out, have earned $45,000". All right, giving twenty-two five to each year.

Again, let's go to the testimony. In those years, that tavern was located in an industrial, residential area, warehousemen and residences. Who worked the tavern, not one employee. Mr. Gay, Mrs. Gay and his mother-in-law and then the question was thrown, the snide question, "Well, you had to sell a lot of beer at ten cents a beer to make sixty-five grand". He never said he made sixty-five grand. Let's go back to '41, if Mr. Mellenge wants to go back to '41, reflect on your wages at that time. Reflect also what a half a barrel of beer cost in '41, but you don't sell just beer in an industrial tavern. You sell shots. Believe me, you get a shot and a beer drinker, I don't have to tell you gentlemen who have been in neighborhood taverns. Get yourself ten beer and shot drinkers and I will take ten of them to a hundred mixed drinkers anyday of the week because you make more money on them.

In 1941, in the City of Buffalo, there were pinball machines in every tavern you ever walked into, neighborhood taverns, - fish fries. By who, - Mrs. Gay and her mother. Now tell me is that so impossible to come out with sixty-five grand because that is what they came out with. That's the start, that's where he started from.

Now, there is another figure in this case that you will find nowhere on any report in Mr. Russo's work sheets. Not one mention of it, and that is according to Mr. Quinn, sometime during the course of this investigation, Mr. Quinn called up the Social Security people and what did he find out. Well, this is very interesting to me because, ladies and gentlemen, if my witnesses were scared, this man is an expert. He is on the witness stand and he works at this. This is his job. He appeared scared to me when we got in this area. Now, believe it or not, a special agent of the Internal Revenue saying to you, "I checked and somebody over there told me", - we don't know who, "that either from 1943 or 1945", we don't know which, "somebody said that he earned $69,000". All right. beautiful, isn't that beautiful, just the way we leave it, so we went to the other expert, Mr. Russo, what is it. You know what it is and I know what it is. It is Social Security earnings. In the interim, between '43 or '45 through '71, Mr. Gay earned $69,000 in Social Security earnings. That means if you hit the top level that you pay on, that is where you stop. They don't know your earnings over and above that, so it was $3,500 back in '43 or '45. When they registered $3,500, they stopped. You recall, - were people making more than thirty-five hundred during those years? Were you, you gentlemen who have worked for years, but that's the testimony that they want you people to say, "Convict Joseph Gay on".

Couldn't they have brought in the Social Security records, - right down the street. No way. You people have a right to say there is a reasonable doubt by lack of proof, as well as the proof that has been submitted. In other words, if the Government should have brought somebody in to testify and failed to bring them in, or should have brought proof in that would convince you further and failed to do so, you have the right to say, "I have a reasonable doubt as a result of that". They got the bond people. We stipulated to the bonds he owns. They got people from Chicago. We stipulated people from Chicago, but Mr. Quinn, this very accurate individual, who wrote down everything that Mr. Gay told him very specifically in his interviews and sat on that stand and read them, and more about that later, has the audacity to come into a court in the

United States before a jury of twelve and say, "I think it was '43 and '45 and he oarned only $69,000", when the records are right down the street or available to him at one phone call. That is what they want you to buy in this kind of a lawsuit, so then we move on in the years for Mr. Gay and Mr. Mellenger says, "Well, every figure in this court except three we can prove, the loan to the brother", all right. He said "three", I say there is five. The loan to the brother, the loan to Mr. Russo, the loan to the daughter, the loan to both daughters, rather, and the $2,000 figure.

Now, that $2,000 figure is on Government Exhibit Number 141, and there it is, cash on hand from interview two thousand, two thousand, two thousand, two thousand, two thousand, two thousand. There is that figure. It is a very important figure to the Government. Exactly $2,000. Now, you heard Mr. Mellenger say "We have to, we have to investigate every lead, every lead", so let's go to Quinn's statement, his interview.

Mr. Gay said he gave out mortgages, sometimes in cash, sometimes by check, so they don't go to the people. They go to the Erie County Savings Bank. I am just going to show you an example. You can check out all of these. The John Bycina mortgage, $10,000, - $10,000.

THE COURT: Mr. Murphy, you said "Erie County Savings Bank". You meant the clerk's office?

MR. MURPHY: No, the John Bycina mortgage, your Honor.

THE COURT: All right.

MR. MURPHY: Was given in 1960, on the 4th day of April, 1960 for $10,000. You will be able to see it. It was available to the IRS people.

We have in evidence Defendant's Exhibits every, - every book. Look at every one of them and you can take them and they all start somewhere back in

'57 to 60's. Some of them are regular savings accounts. Look at them, take them. If you can find one withdrawal out of any one of those books for $10,000 then that mortgage was not given in cash. That money was brought out of a bank to be given to Mr. Bycina. It is not there. Look at all of them in those years. There was no $10,000 withdrawal, so if Mr. Gay said to Mr. Quinn like he did, "Some of the mortgages I gave in cash", and Mr. Quinn says, "Well, from my record, you gave Mr. Bycina $10,000 and you told the other agents in the bar room that you only had $2,000 at any given time was the most you ever had was $2,000, how did you have $10,000 to give". It is not there, is it, so did the Government check out every lead.

He said he gave out cash mortgages. They had all of these here. That is their investigation. You heard the people come on the stand and say that "Mr. Gay gave us some money, gave us the money in cash". Why, if they are checking out every lead, didn't the IRS go to these people. They knew who they were. They had the mortgages. Mr. Gay told them who they were. He gave them the records. Did they really check out every lead which it is their duty to check out. No. I will tell you what they are going to say.

They are going to say, "Mr. Gay, cash on hand", an accounting phrase. An 8th grade educated man is supposed to know that cash on hand means either cash at the beginning of the year or cash at the closing of the year. Technical phrase. First time he was asked it, he told them he couldn't come up with it. All right. The second time he is asked this and believe me, I don't blame them, even if he lied to them. Tell me one of you individuals that would tell anybody in the back room of a bar room that you got $180,000 home in a tin box, in a bar room, because if you are, you had to be very smart to save $183,000, but you are very stupid when you say "I got it" in the bar room because the next day you probably won't have it, and that's the figure that they are stuck with, that two thousand, and there is the lie.

At any one time, ladies and gentlemen, and look at it, at any one time, did they ask for these books. We didn't hide these books. They are right here in the courtroom. They never once asked for them. Now, where is the Government's Exhibits with regard to those books?

Well, they are right here. Now, you look at them. When do they start, '66, every one of them '66. Not one that goes before '66 and why, because they didn't investigate every lead which it is their duty to do because they know. Here is the mortgages. Some of them paid in cash. 1960. We look only for '66, gone, gone. Is that carrying out their duty? These men are special agents. They are Intelligence agents.

That is their job and they didn't do their job.

Now, let's go back to Mr. Gay one more time and let me tell you what a great job the IRS did, what a great job the IRS did was compile figures from every bit of information that was given to them by none other than Joseph Gay. You show me one figure on there that the Federal Government got on its own. Mr. Gay told them, "These are where I have my accounts, these are the mortgages I have, this is the Government bonds where I buy my non-taxable municipals, this is where I do my stock transactions, this is where I bought my car. Here are my mortgages, here is my checking account, here is the book from my printing business", and they went out and got all the figures from the banks by sending them a notice to produce "just give them to us". Everything on that chart was given to them by Mr. Gay. They come to these figures, ladies and gentlemen, from what Mr. Gay told them, sixteen thousand, eighteen thousand, fifty thousand, forty-six thousand and thirty-five thousand because every one of those figures are a matter of public record, - public record that that defendant could not hide from the IRS no matter how hard he tried. Every one of them are in the name of himself or his wife. Not one fictitious name in this whole trial, and that's where they got their case, right from the defendant, but then they say "Oh, no, he never told us about this cash hoard".

They never asked about the cash hoard. When he went up to see Quinn, there was always an IRS expert with him. His accountant was with him, the man who had been in the Intelligence Division for ten years, Mr. Willis. He was with him when he was up there. He did what he was told. He answered the questions that were asked of him. That's why you bring experts with you to interviews like that.

Let's handle, if we will, the loans to the two daughters. Boy, it has got to be a crime. He lends out all these moneys, all this money to his friends. Such a genius investor, charges interest from every one of them, friends of thirty years and then he don't charge interest from his own two daughters and that is something wrong. Well, gentlemen, if he is guilty of income tax evasion because he lent his daughters money and didn't charge them interest, there is not a father in the country who has got to be out of jail. We all got to be in, every one of us. What a crime. His own brother. Mr. Mellenger thinks that his brother testified that he paid interest. My recollection of his testimony is that he did not pay interest, but again, use your recollection and if you don't remember it, ask him to read the testimony back. You will find out his brother never paid a dime of interest and that's why there are no mortgages. He calls them mortgages, but they are nothing but loans to members of the family.

Now, are we going to get a big hassle, he didn't tell Quinn he loaned his kids money. He is in the criminal tax investigation. Maybe he don't want to get them involved. All right, or too, does he think that Quinn is talking about mortgages where interest is charged because interest is taxable. There is two logical explanations for you. Choose either one you want. Did Quinn really write down, did he say, "loans" or did he say "mortgages". To Mr. Gay, a mortgage is you lend a guy money, he pays you back with interest, you put it on your house. Now, if this man is such a genius as an investor, if you are going to deal in this kind of stuff and you are going to be a genius in dealing in it, then when you are not paid, you foreclose and you make more money. That is the shrewd investor. That's the shrewd investor. Give him the mortgage. If they can't pay, foreclose. Sell the house for a greater profit.

What did Mrs. Kaczmarek tell you, he could have foreclosed six or seven times, but he never did. There is not one of them, not one of them probably paid the man on time, but they eventually paid him. They are good for it. That's the shrewd investor.

Now we come to another part of this case, Mr. Russo, Sam Russo, his son-in-law's father, and they had a common interest, horses. All right. Loaned Mr. Russo twenty thousand. Mr. Russo paid him back $20,000 in the year 1967. He was paid back by 1969. The loan was made in cash. Look in the bank books, no deduction of $20,000 there so he must have had $20,000. "Isn't it unfortunate", says Mr. Mellenger, "that Mr. Russo or Mr. Gay's son-in-law, throughout the record". Stop, stop because you are about to fall into a trap and that's this, if it was torn up so conveniently, aren't you entitled then to suspect that maybe it is a lie, jury, and that it never happened and that Mr. Sonny Russo, because he likes his father-in-law is trying to help him out of this case, so suspect that it is a lie, jury, because if he had that $20,000 cash, then the Government is in trouble because the $2,000 is then a lie.

Now, I say to you and the Court will tell you that the defendant is not bound to prove anything. The burden of proof in this case is at this table. It is the power, it is the magnitude of the United States of America sits at this table and they can subpoena any witness in the country at any time and get him here on that much notice.

Did Mr. Russo say, "Yes, there were papers drawn up, my father insisted that the papers be drawn up. My father even had his attorney, Mr. John Laduca draw up these papers, not Mr. Gay's attorney, Mr. Messina. Mr. John Laduca of the Ellicott Square Building, City of Buffalo". If that transaction did not take place, Mr. John Laduca could have been brought over here to testify and say it never took place. It is up to the Government to prove in this case, not the defendant to prove it. My proof was there. The son-in-law who testified in this case, who swore that he testified truthfully said that this is what happened and believe me, the Federal Government, with their investigative power who can bring people from Chicago, New York, Long Island to testify to one little paper, if that transaction didn't happen, Laduca would have been on that stand so fast your eyes would be blinking, not my client's lawyer, a dead man's lawyer, so there is the proof that it happened and you put $20,000 in the hands of Joseph Gay in the year 1967 for the purpose of lending to Mr. Russo and that $2,000 figure is gone, and that's the case, so what people do we have see the money. Mr. Gaj, that's his brother, he saw the money. Sonny Lorusso, he, saw the money. The people who got mortgages got mortgages in cash. They saw money, but the IRS says, "No, we start out every year with $2,000 and that's all we give him", because if you put in here '67 through '68, '69, '71, these figures, expenditures in excess and you are talking about a hundred and ten thousand which started off in those years, - '56 it was a hundred ten thousand. There is expenditures in '67, '68, '69. That's when Mr. Lorusso, in '69, after the robbery, saw a hundred and ten. There was a hundred, approximately, back in '56, again raised, what the man did. He had a habit of saving money in $5,000 packages consisting of fifties and hundreds and fine, label him an eccentric, label him a fool, label him a bad businessman, label him anything you want, but do not label him a criminal, because if he is, he is a criminal because he refuses to live by the way the IRS thinks he should live and no other reason and that's what this case is about.

Now, under the new rules in this courtroom, Mr. Mellenger has an opportunity rebut my statement. Thank God for me, because my voice is losing and probably thank God for you because you are probably sick of listening to me. I don't get a chance to speak to you again and when you listen to that rebuttal, I beg you, those of you who want to accept my argument, think what Mr. Murphy would say to his rebuttal, but, ladies and gentlemen, be fair in this trial.

Let's give this man, - we don't want any sympathy from you people. I got all the sympathy I want from everybody sitting back there. The entire family will give that man all the sympathy he wants. You can only give us one thing in this courtroom and that is it. That is all you can give him is justice.

Summation by Mr. Murphy.

I, for one, am sick, sick that in this country today, they can come in and with proof like that, proof that we gave them and then said, "We did this great big investigation, we come up with all these figures and your man is guilty and we have put it in black and white".

Why, it is a wonder they didn't bring in one of their computers so they could give your verdict for you, so he is an eccentric, so what. A lot of great people in this country have been eccentrics.

Ladies and gentlemen, take the man himself. Is he the genius they want you to believe he is? Is he this expert businessman they want you to believe he is or is he what he purports to be, a man who I probably believe has heard enough of the ethnic jokes going around this area and the country today that maybe got a little bit sick when the IRS man says, "Oh, yes, he had it hid in the mattress". He got angry and he said, "Look, it was a joke, they were making a joke". They didn't ask him about cash then. What they asked him is "Where did you get the money to buy the bond". That's the testimony of Mr. Quinn, not "How much cash have you got", but "Where did you get the money to buy the bond", and we get this facetious reply, "That my wife had it in the mattress". Well, maybe he is sick that he is being looked on as stupid enough to make that reply and maybe casting aspersions on the intelligence of his wife too, because that is all you have got in this case. That is what they are asking you to bring a guilty verdict on. Let the man sweat, let him work, let him try all his life, let him educate his kids, let him lend them some money, let him save and because some IRS experts don't like it, put him in jail or come through with what this case is all about, what the whole system is about. Maybe you twelve wouldn't live the way he did. Maybe you won't live the way the IRS says you got to and if you don't want to, if you feel that this is what he did do, save his money and be an eccentric and have a habit of keeping cash around, then find what the only verdict can be in this case, I beg of you, that of not guilty.

Thank you.

THE COURT: Mr. Mellenger, you have an opportunity for a brief rebuttal. You should keep in mind that whatever you say must be rebuttal and rebuttal only, no new material.

MR. MELLENGER: Yes, your Honor. Thank you.

Ladies and gentlemen, Mr. Murphy is very emotional in closing statements in raising a number of points which should be commented upon at this time.

He started out with Mr. Quinn, this thing about the $65,000, the Social Security earnings in 1943 through 1971. Remember how this came about, how this got into the testimony. I didn't ask Mr. Quinn about this. It was Mr. Murphy

Rebuttal by Mr. Mellenger.

on cross examination.

Likewise, Mr. Murphy made a big point about this mortgage, payment of $10,000 in cash and why didn't the IRS investigate this. Do you remember during the course of this trial, all the objections as to when a document was relevant, whether it was during the indictment years or before or after. It was before or after the indictment years there would be an objection as to relevance. When did the prior years become important, ask yourselves that. They became important after the Government rested its case.

MR. MURPHY: Your Honor, I object to that. That is not proper rebuttal. That was relevant testimony throughout this entire trial, the cash hoard as a defense.

THE COURT: It certainly is, Mr. Mellenger.

MR. MELLENGER: Okay, I will withdraw the statement.

THE COURT: Why don't you continue.

MR. MELLENGER: Mr. Murphy has made a point that the defendant is being prosecuted because he didn't live up to the Internal Revenue Service Agents' standards and he made a point why should he tell them about the money he had in the basement. He was told about a criminal investigation and he was interviewed on four occasions and from the testimony you have heard, that this did not come out until the course of this trial. Scrutinize that, ladies and gentlemen. Did that money exist or didn't it and I submit to you it did not exist until this trial commenced.

Thank you.

THE COURT: So there is no mistake about it, of course, Mr. Mellenger cannot be a witness here. He cannot give you his opinion of the evidence in the case. Certainly as to whether or not there was a cash accumulation, that is for you to determine from all of the evidence here so his submission to you adds nothing to the evidence that we have heard.

The evidence is concluded, summations

are finished. We will come back together tomorrow morning at 10:00 o'clock, at which time I will charge you on the law, which applies to this case. As you are going back home this evening, certainly keep in mind what the attorneys have said to you about their contentions, about their positions here in the lawsuit, but do not discuss their arguments with your fellow jurors if you should happen to ride home with one of them and certainly, do not talk to any of your friends, relatives or associates about any aspect of this trial at this time. Wait until tomorrow after the charge and then when you go to the jury room, that is the time to discuss and to deliberate.

Spectators stay in your places, please, while the jury walks out with the Marshal. 10:00 o'clock tomorrow.

(Jury escorted from the courtroom.)

THE COURT: We will be in recess.

(Recess taken at 4:45 p.m.)

* * * * * * * * *

PROCEEDINGS: April 13, 1976, 10:00 a.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury present.)

THE COURT: Now that we are all assembled, ladies and gentlemen, it is my duty at this time to charge you on the law which applies to this case. The juries responsibility to try to apply that law to the best of your ability to the facts which you find from the testimony of the witnesses and the exhibits which have been introduced into evidence in this lawsuit.

I will have to read portions of the charge to you. I think it's more understandable if, as the lawyers did in their summations, just talked to you, but sometimes we have to give up a little bit and I must be accurate in the charge and therefore I will read portions of it to you but there are some things that I can say to you in the very beginning which we can do without having the formality

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of reading.

One is that whatever you have heard before by way of instruction during the jury selection or during the trial you should consider just as carefully as part of the charge as the remarks I make to you at this time. You also know that as far as Exhibits are concerned that you will receive in the juryroom the Exhibits which are marked in evidence in this case. There are certain Exhibits which were marked which were not used or which were marked and just referred to briefly during the testimony of a witness and Exhibits like that which are not marked in accordance with the rules will not be sent to you in the jury room.

You are to decide this case upon the evidence which you have heard here in the courtroom and not on any other consideration. For example, attitude toward tax law generally or some feeling we ought to do something about this. You are not detectives in a case such as this. It is your job to determine guilt or innocence.

It is not a who done it and it is not your job to be investigators. That is, to say, "Well, what about so and so, we didn't hear from him and I suspect that he could have done this or that or said this or that". We are not here to deal in conjecture. You are to deal in the facts which you have heard during the course of this trial.

You know that there is an indictment here as I have said to you before. The indictment, as far as you are concerned, is no evidence of any criminal conduct at all. It is a guide to you so that when you return your verdict you will be able to use it as a guide so that we will, and I will tell you now, that along with the Exhibits which are in evidence, we will also hand you the indictment, but in your use of it, keep in mind that it is only to be used simply as a score sheet. In noting the indictment it is well to keep in mind what I told you at the very beginning that in this case, that the defendant, Joseph J. Gay is presumed innocent.

He is presumed innocent of that charge until proven guilty beyond a reasonable doubt and that can not occur only if you find, after you consider all the facts in the case and my charge on the law. If you then decide that he is guilty of any one of these particular charges, beyond a reasonable doubt, then when you come into Court and announce your verdict, that is when, and only then, when the presumption is overcome.

You will note also in the indictment, that there are figures there which the Government charges that the taxable income was not stated correctly and the tax due was not stated correctly in certain amounts. It may be when you look at the evidence that the particular amount in the indictment was not met. That is not the obligation of the Government. The Government's obligation is to prove a substantial amount of tax which the defendant is charged with defrauding and the Government is not obliged to prove

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the exact figures which are set forth in the indictment.

You know by now that any verdict you return must be unanimous. You should take up each Count separately and have a separate vote on each Count and your verdict on each and every one of those Counts be a unanimous vote.

Before you reach a verdict, certainly you must deliberate and deliberation means that each one of you participate giving your ideas in a reasoned, careful manner about what you find, what your attitude is toward the facts and relaying that to your fellow jurors but at the same time keeping an open mind and listening to their suggestions about what they find the facts to be. After this mix and intermix of discussion, you come to the conclusion, conscientious, reasoned that you were in the right, then you should not change your mind. On the other hand, if you find, after listening to your fellow jurors that their arguments are more persuasive and that they are based upon the evidence and upon the law, then, of course, then you should not for some reason of pitiness of sympathy or prejudice or for some other reason which is not appropriate, you should not, of course, insist upon following your course after you are convinced that your fellow jurors have the better of the argument so it is through this interaction of conversation about the testimony of the witnesses and about how this testimony applies to the law in the case, that you will finally come to your verdict which I have explained to you, must be unanimous.

It is helpful in your deliberation to select one of your number to be a foreman. This man or lady can be a person who would, when coming into Court, finally be the spokesman for your body in announcing the verdict and also if you have any questions during your deliberation, can be the person who will communicate with the Court. Any communication to the Court should only be by written note given to the Marshal. That is the only way you should attempt to communicate to the Court and you should not attempt to communicate to anyone else during your deliberation and then if you send a note to the Marshal, if you have some question, you will come into Court with the lawyers present and the defendant and we will take up your question at that time if the Court has any question will be addressed to your foreman who will act as your spokesman. It is well to keep in mind in that event you should not tell me how you stand numerically until you have reached a unanimous verdict on any one or all of the Counts.

In this case there are some general considerations which you should keep in mind. Some of this I have said before but I believe it is well worth repeating. You are concerned with this case only. You are not here to set general policies of tax law. You must take the law as I charge it and you can only decide the case upon the facts which you have heard in the case.

Some of the facts, because of the cooperation of the attorneys, have been stipulated and as I have explained to you before, if you have a stipulation which is in evidence, you may consider that just as you would the testimony of the witnesses in the case.

You have heard the lawyers talk about direct and circumstantial evidence. I believe that these are simple concepts but should be explained. Direct evidence is something which a witness heard or observed or saw at a particular time. The various documents which we have here in evidence, that is direct evidence.

The other evidence which you may consider in the case is circumstantial evidence. That is where certain facts which have been received in evidence and which you consider have been proven, and from those chain of facts you come to certain conclusions. That is circumstantial evidence which you are entitled to use. You are entitled to make certain inferences from facts which you find have been proven

This the jury take [illegible] did not [illegible]

as long as the inferences are reasonable. Circumstantial evidence as we know, must be cautiously used because if certain facts point to one conclusion and just as reasonably point to another conclusion in a criminal case you must accept the conclusions, the inferences which point to innocence because the Government has the burden of proving guilt beyond a reasonable doubt.

I believe Mr. Mellenger gave an example during his summation. We here, in our area, - for example, probably some of you have heard before that I give an example and that is of snow falling and I guess maybe now that it is April, we have to find another example because we hope we are not going to have a snow fall again soon, but if you retire at night and you find that the lawns and the streets are dry and you arise in the morning and there is snow on the ground, then you can come to the conclusion, although it is not snowing when you get up in the morning, that it snowed during the night.

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That is circumstantial evidence [illegible] is reasonably applied in that case, but if you are gone for several days and you find that there is snow on the ground, you can infer that it snowed, but you can make no judgment about when it snowed, so that as I say, circumstantial evidence must be used in a cautious manner but in any event, either direct or circumstantial evidence may be used in your discussion and your determination of the issues in the case.

We have talked about reasonable doubt. Reasonable doubt is a fair doubt based upon reason and common sense and arising from the evidence. It is rarely possible to prove anything to an absolute certainty. A reasonable doubt is not a vague, speculative or imaginative doubt but it is such a doubt as would cause prudent men to hesitate before acting in matters of importance to themselves. A defendant is never to be convicted on suspicion, conjecture or surmise. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt, the defendant has the right to rely upon failure of the prosecution to establish such proof.

The law does not impose upon the defendant the duty of producing any evidence whatsoever. You are to keep in mind that you are to consider not only the direct evidence in the case but the cross examination, whatever evidence was put in by the defendant and all the testimony of the witnesses and the Exhibits which are in evidence in the case.

In your consideration of the term "reasonable doubt" you should keep in mind that if you feel uncertain and not fully convinced that the defendant is guilty of the crime charged and that you believe that you are acting in a reasonable manner and if you believe a reasonable man or woman in any matter of like importance would hesitate to convict because of such a doubt as you have, that is a reasonable doubt to the benefit of which the defendant is entitled.

It is obvious that to make up your mind about the facts of the case you are going to rely certainly on the documents but primarily on the testimony of the witnesses who have testified. These rules, - I am going to give you some general rules on how to handle the credibility, the believability of the witnesses or how to derive facts from their testimony. A lot of it is just based upon common sense, everyday good judgment and all of the witnesses are to be handled in the same fashion, the defendant as well as the other witnesses.

You should, in this consideration, - you will consider the testimony of the witnesses who have testified and how their testimony is connected one with the other; how it stands up under cross examination; how it concurs with the Exhibits; whether or not the testimony of one witness is supported by another witness or whether it is contradicted by another witness.

You ladies and gentlemen are the sole

judges of the credibility of the witnesses and it is up to you to determine how much weight their testimony deserves. You should carefully scrutinize the testimony given, the circumstances under which each witness testified and every matter in evidence which tends to indicate whether the witness is worthy of belief.

You may take into consideration the witness' appearance, attitude, behavior, interest of the witness in the outcome of the case, relationship of a party to any, - relationship of a witness to any party in the suit, the inclination of the witness to speak truthfully or not, the probability or improbability of the witness' statement and all other facts and circumstances in evidence. You may consider any conscious or unconscious bias or prejudice that the witness may have toward either side of the case; what hope of reward the witness may feel that he or she may receive because of the outcome of the litigation. You should consider the demeanor and manner of the witness on the stand. You should consider the witness' intelligence, motives, state of mind while testifying.

You will determine whether the witness had the opportunity to see and observe the matters to which he or she testified. You should determine whether or not in your judgment the witness had an accurate recollection of what had occurred; did the events happen a short time ago or a long time ago. That may, of course, have some bearing upon the witness' opportunity to recall what the conversation was or what he observed at a particular time.

Inconsistencies or discrepencies in the testimony of a witness does not mean that you must discredit such testimony entirely. In weighing the effect of the discrepancy you will always consider whether it pertains to a matter of importance or an unimportant detail and whether the discrepancy results from falsehood or from innocent error. You, ladies and gentlemen, it is up to you to use your common sense under these general rules in determining the facts from the testimony of the witnesses and the consideration of the Exhibits which are in evidence. As I have said to you before that in matters of importance to you in your own life, personal, business, whatever other problems you have, you may follow the same considerations that you use here or you use there in weighing the credibility and believability of the witnesses who testified here.

In this case you will recall that there are certain Exhibits which are before you here and as I have told you before these are guides to you only. They do not have independent life of their own. They are only as good as the underlying testimony of the witnesses who supplied the information and the underlying Exhibits which are referred to during the testimony of the expert.

Usually the testimony of a person can not, as you recall maybe during the trial there was an objection made to the testimony of some witness because it was opinion. Usually we do not listen to the opinions. If I was in here and the issues at stake were cooking and I gave some view of it, the attorneys would probably object because I am not qualified in that field but if we have a witness who, because of training, experience, study, has become expert in some field, then he may give his opinion. In this case we had the witness who testified about the preparation of the charts. Of course, the witness', the expert witness' opinion is only as good, can not be better than the facts which form the basis of his opinion so if you find either that the facts he used were not good enough or that his experience was not good enough, and in this regard you should certainly keep in mind cross examination especially, that you may discount or disregard his final results to the extent which you feel are appropriate under the circumstances.

We now can go on to the charge itself. In this particular indictment, Mr. Gay, who is married, filed a return. The charge is he willfully attempted to evade and defeat a large part of the income tax due and owing by him and his wife to the United States by causing to be filed false and fraudulent income tax returns on behalf of himself and his wife and that he substantially understated his and his wife's income for the years 1967 through 1971, inclusive, in violation of Title 26, United States Code, Section 7201.

That Section provides in part that any person who willfully attempts in any manner to evade or defeat any tax imposed shall be guilty of an offense against the laws of the United States.

There are three essential elements which the Government is required to prove beyond a reasonable doubt in order to establish the offense charged in the indictment. First, the fact that a substantial additional amount of Federal Income Tax due and owing from the accused for the particular calendar year in question over and above the amount of the tax which was declared or disclosed in the defendant's income tax return for the calendar year.

Secondly, the Government must also prove beyond a reasonable doubt, knowledge on the part of the accused that there was some additional Federal Income Tax due and owing.

Thirdly, the Government must prove beyond a reasonable doubt that the accused acted willfully, that he willfully attempted in some manner to evade or defeat the additional tax with a specific intent to defraud the Government of such additional tax.

As I have said to you before, the burden is always upon the prosecution to prove guilt beyond a reasonable doubt of every essential element of the crime charged. Again, you should take up each Count separately, each year separately.

There are certain words which I should define in a little greater detail. To attempt to evade or defeat a tax involves two things. First, an intent to evade and defeat the tax and some act willfully done in furtherance of such intent. The word "attempt" contemplates that the accused had knowledge and understanding that during the calendar years in question he and his wife had an income which was taxable and which they were required by law to report but he nevertheless attempted to evade or defeat tax thereon or a substantial portion thereof by willfully failing to report all the income which he knew they had during such calendar year and which he knew it was his duty under the law to state in the return for such years.

Various schemes, subterfuges and devices may be resorted to, and this is certainly only an example. I am not saying that any of these things occurred, - in an attempt to evade and defeat the tax.

The one alleged in the indictment in this case is the filing of false and fraudulent returns with the intent to evade or defeat the tax. This attempt to evade or defeat the tax must be willful. That is, it must be an attempt made voluntarily and intentionally and with specific intent to keep from the United States a tax imposed by the income tax laws which it was the legal duty of the accused to pay to the United States and which the accused knew it was his legal duty to pay.

The attempt must be made with a bad purpose of willfully seeking to defraud the United States of some substantial amount of income tax lawfully due from the accused.

To establish the crime of income tax evasion as charged in the indictment the prosecution must prove beyond a reasonable doubt that the defendant willfully attempted to evade or defeat a tax due the Government. A willful attempt may be inferred from a consistent pattern of understatement of income; from such conduct as the handling of financial affairs in a manner so as to avoid making the usual records;

Savings bank accounts

the concealment of assets or sources of income or from any other conduct which would be likely to mislead or to conceal.

Again, ladies and gentlemen, I want to make clear that these are examples only. The facts are up to you to find and I am not saying that any of these things occurred. All of this is for you to decide.

If you find beyond a reasonable doubt from the evidence in the case that a fraudulent return was filed with the specific intent on the part of the accused to evade or defeat a substantial part of the tax lawfully due from him and that this was done willfully the offense was complete as soon as the fraudulent return was willfully filed.

A fraudulent tax return is one that is false and known to be false by the person making it or causing it to be made and is willfully filed with the intent to deceive. We are concerned, ladies and gentlemen, in this case as far as time is concerned, that is what is the state of mind of a defendant in any case as of the time of filing the return. That is the important time and that is the time when the Government must prove that he had the specific intent to evade or defeat the tax.

As I told you before the proof need not show an evasion of the exact amount of the tax alleged in the indictment. The evidence in the case must establish beyond a reasonable doubt that the accused willfully attempted to evade or defeat some substantial portion of the tax alleged as charged.

In this case the Government relies upon what is known as the expenditures method of proof. The theory of this method is that if an individual had expenditures in any given year which exceeded the amount of income reported on his return and such excess of expenditures were not attributable to gifts, inheritances, loans, prior accumulation of assets or other non-taxable sources such excess expenditures are taxable income of that individual for that year.

We know certainly that if we are working for a company, any company, and we receive a paycheck from them that that is taxable income for the year in which we receive the pay. We know that if we have stocks and we get a dividend check from a company that is taxable income. Interest received from a bank during the taxable years is taxable income.

On the other hand, if we receive a loan, any kind of a loan, a mortgage loan, a loan on our car, just a personal loan from any lending institution or any person that is not taxable income for the year in question. If your great aunt gives you a gift of $500 that is not taxable income. If your father or mother dies and leaves you some money in a will, that is not taxable income.

If we earn money in the year 1970, cash, and we put it in safe deposit box, we just keep it about the house or we spend it, - it doesn't make any difference, -

that can not be considered as taxable income for the year 1971. The tax law is concerned about what we receive in the particular year and makes a distinction between taxable and non-taxable income.

If you find in this case that the defendant's expenditures after considering non-taxable sources for a given year still exceeds gross income reported in the defendant's tax return for that year you should determine whether the Government has established those excess expenditures as representing taxable income and which the defendant willfully attempted to evade and defeat the tax. In making up your mind in this regard you will have with you in the jury room the summaries, the sheets which were prepared by the Government's witness and which were testified to in the course of the trial and you will recall the testimony in that regard and you will have the sheets to guide you about what the defendant's expenditures were during a particular year.

w/o regard to testified variances

You will also have the analysis of the non-taxable sources for a given year. You will have the expert's calculation of what the gross income, - of course, whatever is in the tax return is set out in the tax return and you will also have reported on there what the excess expenditures as representing taxable income were during the year.

It is up to you to make up your mind as to the accuracy of all these figures. It is up to you to determine whether or not the calculations and the final results were correct and it is up to you certainly to determine whether or not the expert's allocation of certain things as non-taxable income within the charge as I have given it to you is correct or non-correct, and I will get to more of that in a minute.

The Government has the burden of establishing beyond a reasonable doubt that the expenditures come from a taxable source. However, the burden of establishing a taxable source does not mean that the exact origin of the expenditures must be proved by the Government. This requirement only means that the Government must prove that the expenditures did not come from a non-taxable source.

Explanation ~~of~~ or leads may be offered to the Government by or on behalf of the defendant as to the source of the funds expended during the prosecution years such as cash on hand from prior years, receipts of gifts, loans, inheritances or other non-taxable sources. If these are reasonably suseptible of being checked, the Government must investigate the truth of the explanation.

Must [illegible] [illegible]

On the other hand, when relevant leads are not forthcoming, the Government is not required to negate every conceivable source of non-taxable funds. Whether or not the Government checked reasonably the leads offered by the defendant, whether the defendant gave to the Government any leads, that's for you to decide. Certainly many of the mortgage information, information about the dividends, the bank accounts was all given to the Government and we have it all here, but whether or not there were other leads and whether or not the Government carried out their obligation in checking into them, that is for you to determine.

As far as the problem of non-taxable sources is concerned, it appears to me, and again, this is for you to determine, that the most important issue in this case has to do with whether or not there was a cash accumulation from prior years. If there is a cash accumulation and you believe that there is a cash accumulation, then, of course, that is not a taxable source of income for the years 1967, 1968, 1969.

In a case such as this, the Government must establish, with reasonable certainly, what is known as an opening net worth which serves as a starting point from which to calculate future increases in a taxpayer's assets. To establish a taxpayer's opening net worth, the Government must make clear the extent of any contribution which beginning resources could have made to expenditures. In other words, the Government must show what funds are available to the taxpayer at the opening date of each prosecution year. If there is no established figure showing the source from which expenditures during the year were made or if there is a complete lack of such a source then the Government has failed to prove an essential element of their case.

In this case here, as far as many of the items and, of course, you may pick up some others that were left out, but many of the items such as the stock items, the ownership of stock, the bank accounts, the fact that he had a home, all of these things are on record and there is no great argument about that, but as far as how much cash that Mr. Gay had at the beginning of each year, there is an argument about that. The Government claims during, - and it is up to you to find the facts and I am going to summarize this very quickly, but it is up to you to determine. I probably will leave something out. No doubt I will. I am not going to state each contention as completely and carefully as the lawyers did, and perhaps, they left something out or put something in. It is for you to determine from the testimony of all the witnesses just what the state of affairs was in regard to this. As far as the opening net worth, as far as cash on hand at the beginning, the Government claims that Mr. Gay, upon questioning by the Revenue Agent, said that he had about $2,000 cash on hand. Because of this statement and also because of the fact that he was questioned about other mortgage loans or other loans, and he said, "Well, I told you about the loans I have with certain individuals", which the Government checked out and found to be so, but he did not reveal loans which he had with his family members or with Mr. Russo. The Government says, "Well, he claimed that he only had $2,000 cash on hand". The Government claims that that meant that he did not have any prior accumulation of cash. Mr. Gay has several explanations for this.

One is, as I understand it, that he did not understand what the Revenue Agent was talking about and the other is that at the time that he just did not want to get into explaining to him that he has this cash money in his house. He did not think it was any business of the Revenue Agent. All of these, these are facts for you to determine where the truth lies. It is up to you to recall the testimony and it is up to you to determine from all the facts which side is truthful, but remember, and this is an important consideration, the Government has the burden of proving these facts beyond a reasonable doubt, so if there is a question here one way or another and you find it is evenly divided, "I really do not know which way my hand should come down on this", in that case, if it is fifty-fifty, then the defendant is entitled to the benefit of reasonable doubt.

This concept of opening net worth is tied in in this case with the question of whether or not Mr. Gay had a large amount of cash which he kept in his home and had there before the taxable years in question.

It is clear that if the defendant did accumulate cash from prior years, that money cannot be taxable income for the years in question. It might have been taxable income for the prior years, but we are not concerned with those years and you may not speculate whether any cash accumulation from prior years was taxable or not in those prior years. You must assume that whatever income he had from the prior

Who requested

years that the proper tax was paid upon it; that he had the right to have the money.

The Government does not claim that it is able to prove the exact source of the added expenditures which their chart in their calculation shows here.

During the years in question, the Government has the burden of presenting evidence from which you may conclude beyond a reasonable doubt that the expenditures did come from taxable sources, but as I have already said, the Government is not obliged to prove the exact nature of the sources. That is, that Mr. Gay worked at a particular job or he made certain particular investments, where he got certain particular money, but what the obligation of the Government is it must establish beyond a reasonable doubt that the expenditures did not come from a tax-exempt source.

I have discussed this a little bit with you, but in determining that question, you should certainly keep in mind that testimony of all the witnesses here, including Mr. Gay, about how he came by this cash accumulation, the testimony of the other witnesses who observed the money, the testimony of how loans were made by him, you will remember Mr. Murphy's argument about the bank books and it is agreed that these are all of the bank books. The Government does not claim that there were any other bank accounts which are not available to us and which are not present in the court and at the time when large loans were made, there were no withdrawal from funds and Mr. Murphy argues from that that, therefore, the money must have come from this cash accumulation. Whether that is a good argument or bad argument, it is for you to determine from all of the circumstances.

Acknowledgement
or confession
what wrong
Gov't case!

You may find, as far as the conversation of Mr. Gay with the agent that he did not understand what the agent was talking about or he did understand and made an answer which was false under the circumstances. In conversation with any agent of the Government, it is our obligation to either not say anything or to be truthful and you may find that Mr. Gay was not truthful here, but on the other hand, you may also find that he was not truthful and he had the cash accumulation. You may consider his untruthfulness there, I suppose, as some circumstance of whether or not how you should charge his credibility as a witness, but you may find, - you will remember Mr. Murphy's argument about talking to strangers and whether or not he, - under the circumstances, he was obliged to tell all, but the important question is whether or not he had a cash accumulation at the time and even if he gave a false answer to the agent and he did have a false accumulation or he did have an accumulation of cash, cash accumulation, then it could not be considered as a taxable income during the years in question.

As I have told you before, you must consider each year separately.

As I have already implied, you may consider the statements of the defendant made to the agent during the interview if you find they were made voluntarily by him and certainly, if he were made to understandably, - I mean, on these whether or not he understood the terms used. That is for you to determine.

This is not a case here to determine any civil liability about what amount of tax should or should not be paid. We are concerned with that. We are concerned in this case only with whether or not under the law, as I have charged it to you, Mr. Gay is not guilty or guilty of the crime charged.

[illegible]
Question

The defendant's acts in connection with a criminal case such as this must be willful and they are not willful if they were done through inadvertence, carelessness, honest misunderstanding of what was required under the circumstances. The fact that the defendant's signature appears at the bottom of the tax return is prima facie evidence that he knew the contents of the return.

In a case such as this, the Government must show the defendant acted willfully and knowingly with a specific intent to evade the income tax obligation. That means proof of a conscious, deliberate, purposeful act or omission as opposed to an unconscious, unwilling, negligent or mistaken one.

At this time, ladies and gentlemen, I will ask you to step into the corridor for a minute. I must listen to any further requests to charge from the lawyers and any exceptions which they have to the charge which I have delivered to you. We will have you back immediately. Will you step out with the Marshal, please.

(Jury escorted from the courtroom.)

THE COURT: Mr. Mellenger, any requests or exceptions?

MR. MELLENGER: The Government has no additional requests and it has no exception to the charge as given.

THE COURT: Mr. Murphy.

MR. MURPHY: The charge is satisfactory to the defendant, your Honor. No requests, no exceptions.

THE COURT: Mr. Anderson, have the jury come back, please.

(Jury returns to the courtroom.)

THE COURT: Will the marshals step forward, please.

(One male and one female Deputy United States Marshals sworn as custodians of the jury.)

THE COURT: Mrs. King and Mrs. Fagan, since we can only have twelve jurors deliberate, you will be excused from further consideration in this case. Judge Elfvin and I plan to pick some juries next Tuesday so we will ask you to come back next Tuesday, please, at quarter to 10:00. Mr. Anderson, you have the letters.

THE CLERK: Quarter to 9:00.

THE COURT: Quarter to 9:00, 8:45. At quarter to nine, please, next Tuesday morning. Mr. Anderson, you have the letters?

DEPUTY UNITED STATES MARSHAL ANDERSON: Yes, Your Honor.

THE COURT: Mr. Anderson has a letter of instruction for you. Thank you.

Ladies and gentlemen, you may now retire to the jury room with the marshal and begin your deliberation. The exhibits will be delivered to you along with the indictment shortly. You may go out with the marshal.

(Jury retires to commence its deliberation at 10:55 a.m.)

THE COURT: Mr. Mellenger and Mr. Murphy, please stay and meet with Mr. White and make sure only exhibits admitted in evidence go to the jury.

MR. MURPHY: Yes, your Honor.

(Government's Exhibits Numbered 10 and 16-1 received in evidence.)

THE COURT: We will be in recess.

(Recess taken at 10:56 a.m., pending deliberation of the jury.)

* * * * * * * * *

PROCEEDINGS: After recess, 12:10 p.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury not present.)

THE COURT: The jury will be up in a minute and I just could tell you briefly what they want and I think if they want anything, what we will do is break and see how far we are going to go. Evidently, they have the idea that Mr. Knisley is a genius in transcribing because they keep saying, "We would like to see Mr. Gay's testimony about personal mortgages, we would like to see Mr. Mellenger's summation". It almost sounds to me as if that is a monument, but beyond that, we do not have it typed. "We would like to see Mr. Leonard Gaj's testimony regarding the mortgages from Joseph Gay. We would like to see Agent Quinn's interview concerning cash on hand and Krysztof's interview of cash on hand".

If they want to hear the testimony of Mr. Gay and if they want to hear Mr. Leonard Gaj's testimony about mortgages from Joseph Gay, we could dig that out and if that is the case, we could probably take a luncheon break now and have the jury come back and then read it to them. I do not think it is appropriate to read Mr. Mellenger's summation even though it was a master of craftsmanship, Mr. Mellenger. You would not object to that, would you, Mr. Murphy?

MR. MURPHY: No, your Honor.

THE COURT: I think, frankly, as you know in these cases, I usually tell the jury "You are to make up your mind based on all the evidence and you should not zero in on any one part of it. You should try to recall from the testimony, what was said.

As far as Quinn's interview, that is not in evidence, the interview itself. We could, I suppose, have the testimony read which covers that part of the interview, but then, on the other hand, there is more to it than that because there is Mr. Gay's recollection of what was said.

(Jury returns to the courtroom.)

THE COURT: Ladies and gentlemen, I have a note from you in which you say in a series of four questions, "We would like to see certain testimony". There is a mechanical explanation which must be made. You know Mr. Knisley is here and he takes down, in shorthand, everything that is said during the course of a criminal trial, but he cannot be two places at once. He cannot take it down in shorthand and type it up and it is not the practice to type up all the transcripts in any trial. Sometimes, because of special problems, some of the transcript is typed up as the case progresses, but none of it was typed up here, so we cannot show any of the transcript, whether it is of testimony or of summation to you at this time.

What that means is that if you want to hear certain parts of the transcript or of the testimony, then, and also Mr. Knisley has a number of books in front of him, and the witnesses for example, Mr. Gay testified about other things in addition to the portional mortgages so that Mr. Knisley would have to take a break and look through his notes and find the portions, so if that is the case, when we decide what you want to hear, then we will take a noon break and then we will come back and he will read the portions that you want to hear.

There are certain considerations that apply in any criminal case, in any case at all. That is, you should not make up your mind in the case based on one particular portion of the testimony of any particular witness. You must determine the facts from all of the witnesses in the case and from all the direct and all of the cross examination.

The danger, as I see if, from having certain portions of testimony read of a particular witness is that that particular portion then becomes, - has an importance, perhaps greater in the mind of some people than maybe some of the rest of the testimony which may be just as important. You know the old story we have heard so many times that so and so always tries to get the last word. The reason people try to get the last word is that I think we know through human experience that quite often, the last word is the one that we remember most and in a trial such as this, the last word may be the most important and it may not be the most important so that I leave this with you as a consideration of whether or not you should have any of this testimony read back.

The other thing is that we have a request to see Mr. Mellenger's summation. The summation, it is not part of the evidence. It is a guide to help you and I do not think that it is appropriate that we read a summation again or any part of it and, therefore, we will not hear Mr. Mellenger's summation read again.

As far as your Question 4, "We would like to see Agent Quinn's interview concerning cash on hand and Krysztof's interview about cash on hand", as I have explained to you before, some exhibits are marked in evidence and some exhibits are not. The agents' interview reports are not in evidence. The reason they are not in evidence is that we are concerned here not with what notes the agent made, we are concerned with what he testified to, under oath, in court. Certain portions of his interview reports were used by the attorneys in cross examining Mr. Quinn or Mr. Krysztof or perhaps in redirect examination. The simple reason that the interview notes are not here is that the rules provide that under the circumstances that we have had in this case that they were not marked in evidence and, therefore, we will not deliver the paper to you. We cannot do that, but you, of course, make up your mind from what you heard in the testimony in the case. If it is essential that you hear any of Mr. Quinn's or Mr. Krysztof's testimony about the interviews, you should keep in mind that we also had Mr. Gay who testified about the particular interview.

The other thing is that, as I have started off by explaining, unless there is a good reason for this, I believe, in my experience, that it is best that the jury take the case as a whole, make up your mind on the case as a whole and not take a particular part or bit of some particular testimony in order to resolve the issues.

With that speech in mind, I think that you may want to make a reconsideration of what you need and what you want because we just do not have any of the transcript typed. Is the Foreman Number 1, - all right. What you can do is, I suppose it is hard for you to speak right now what the consensus of the jury is about wanting any of this material. Why don't you step into the corridor for a minute with the jurors and see if you want to revise your questions. Would you do that, please. Do you have some paper, Mr. White?

(Jury escorted from the courtroom.)

(Recess taken at 12:18 p.m.)

* * * * * * * *

PROCEEDINGS: After recess, 12:28 p.m.
APPEARANCES: As before noted.
(Defendant present.)
(Jury present.)

THE COURT: Ladies and gentlemen, your answer is "No inquiries at this time". That means that you do not desire, - the consensus is that you do not desire to have any of the material read which you referred to in your prior note. That seems to be the general sense of the jury. You can return and continue deliberating. Can you make arrangements for lunch soon, Mr. Anderson?

DEPUTY U. S. MARSHAL ANDERSON: Certainly, your Honor.

THE COURT: Very well. You might as well continue to deliberate. The Marshal has to call and make some advance notice and then you can take a luncheon break soon. Spectators, stay in your places and the jury may walk out with the Marshal.

(Jury retires to resume its deliberation at 12:30 p.m.)

THE COURT: We will be in recess.

(Court Exhibits Numbered 34 and 35 marked for identification.)

(Recess taken at 12:30)

* * * * * * * *

PROCEEDINGS: After recess, 3:24 p.m.

APPEARANCES: As before noted.

(Defendant present.)

(Jury present.)

THE COURT: I understand that you have agreed upon a verdict.

THE FOREMAN: Yes, your Honor.

THE COURT: Mr. White, call the roll, please.

THE CLERK: Jury, kindly answer to your names.

(Jury roll called. All twelve jurors present.)

THE CLERK: Will the foreman kindly rise. Members of the jury, have you agreed upon your verdict?

THE FOREMAN: Yes, we have.

THE COURT: What is your verdict to Count 1 of the indictment?

THE FOREMAN: Guilty.

THE CLERK: Count 2?

THE FOREMAN: Guilty.

THE CLERK: Count 3?

THE FOREMAN: Guilty.

THE CLERK: Count 4?

THE FOREMAN: Guilty.

THE CLERK: Count 5?

THE FOREMAN: Guilty.

THE CLERK: Members of the jury, kindly listen as the Court records your verdict. You find the Defendant Joseph Gay guilty on all five counts of the indictment?

THE FOREMAN: Yes, we do.

THE CLERK: Is your verdict as the Court has recorded it?

THE FOREMAN: Yes.

THE CLERK: So say you all?

THE JURY: Yes.

THE COURT: Mr. Murphy, do you desire the jury be polled?

MR. MURPHY: No, your Honor.

THE COURT: Very well. Ladies and gentlemen, you are discharged now from consideration in this case. Your next appearance, we will ask you to come in next Tuesday and Judge Elfvin and I are going to select some juries in other cases. If there are individuals, any individuals who have some special reason why you cannot serve during that time, if you will wait just a few minutes, we will take up your problems. you may, at this time, walk out with the Marshal and you are discharged from this case. Thank you. Mr. Anderson has a letter of instruction to you as you go out.

(Jury escorted from the courtroom.)

THE COURT: Mr. Murphy, we will set the date of sentence for May 17th.

MR. MURPHY: I am sorry, your Honor.

THE COURT: May 17th, the date of sentence. I say this out of caution. I know that you are aware of the rule which provides that any motions directed against the verdict must be made within seven days, any additional motions, and I cannot extend the time unless the motions are made within that period of time. Furthermore, you do have a motion which I have reserved upon, which I will consider any additional information that you desire to send in to me and I would expect if you will send anything to me, that you will have it to me by at least the 3rd of May and in the meantime, Mr. Gay, I think, perhaps, he can make an appointment today with the Probation Office to start the presentence investigation.

MR. MURPHY: Yes, your Honor. Thank you, your Honor.

THE COURT: Very well. We will be in recess in this case.

(Proceedings of trial herein concluded at 3:27 p.m.)

* * * * * * * * *

Transcript of Proceedings, April 20, 1976.
Motions.

PROCEEDINGS: April 20, 1976, 9:30 a.m. in chambers.

APPEARANCES: As before noted.

(Defendant not present.)

THE COURT: You have filed a motion on April 19th seeking to set aside the verdict of guilty returned against Mr. Gay and entry of a judgment of acquittal on the ground the verdict is contrary to the weight of the evidence and is not supported by substantial evidence.

MR. MURPHY: Your Honor, I also ask alternative relief for a new trial.

THE COURT: You want to move for a new trial. All right. This is a motion based on Rule 29 and 33 of the Federal Rules of Criminal Procedure and we will extend your time further to supply additional information to the Court; that it appears to the Court it may be of benefit to counsel and to the Court that transcript of the proceedings of trial be made before hearing the motions; that as I understand it, you have ordered transcript and Mr. Knisley is now going to determine how much and when we can have that available. As soon as the transcript is prepared, then I would immediately set a briefing schedule. It appears that because the jury has returned a verdict that we ought to give all reasonable priority to it, keeping in mind that Mr. Knisley is under other directions of the Court of Appeals to get copy in in other cases, but when we set the briefing schedule, we will set a reasonable one; that we should try to adhere to it just as carefully as possible and also, give the Government an opportunity to respond.

In the meantime, Mr. Gay may be continued on bail. He should continue to make any arrangements necessary with the Probation Officer to have the presentence report prepared. I will tentatively adjourn the time of sentencing, however, until after action on the motions, if that is agreeable to you.

MR. MURPHY: Yes, your Honor.

THE COURT: All right.

(Proceedings in chambers concluded at 9:35 a.m.)

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I certify that the foregoing is a complete and accurate transcription of my shorthand notes taken herein.

E. F. Knisley

E. F. KNISLEY, Official Reporter, USDC, WDNY

GOVERNMENT EXHIBIT 141

JOS. J. GAY :

ANALYSIS OF BANK BALANCES & CASH ON HAND
FOR THE YEARS ENDING 12-31-66 thru 12-31-71

GOV. EX. No.		ACCOUNT No.	NAME	12/31/66	12/31/67	12/31/68	12/31/69	12/31/70	12/31/71
			MARINE TRUST CO.						
# 17	WITNESS ROB. CLARK	781-70179	GAY PRINTING (CHECKING)	124966	160493	253335	177729	130883	99195
18		781-51360	JOSEPH GAY (SAVINGS)	1216707	199936	—	—	—	—
20		781-45069	JOSEPH & STELLA GAY (SAVINGS)	—	—	3675162	4268817	289594	1147109
19		357	JOSEPH & STELLA GAY (SAVINGS CERT.)	—	25000 -	—	—	—	—
SUB-TOTAL				1341673	2860429	3928497	4448546	420477	1246304
			BUFFALO SAVINGS BANK						
# 27	WITNESS WALTER WEHR	763292	JOSEPH GAY	875481	1004991	1056185	1110157	83132	508457
29		763298	STELLA GAY	1137764	1248272	1311761	1378899	3285	629519
31		760861	JOSEPH & STELLA GAY	875341	972480	1022030	1074246	3412	528955
33		760865	JOSEPH GAY (AS TRUSTEE FOR STELLA GAY)	681242	768492	807639	902292	2860	512751
35		760864	STELLA GAY (AS TRUSTEE FOR JOSEPH GAY)	704426	792909	833302	929267	9919	582028
37		760862	STELLA GAY (AS TRUSTEE FOR LORRAINE GAY)	704426	792909	833302	875586	—	—
38		760863	JOSEPH GAY (AS TRUSTEE FOR DOROTHY GAY)	632041	716723	753295	791787	—	—
39		809694	JOSEPH GAY (AS TRUSTEE FOR JOSEPH GAY)	145968	1534.00	161213	317102	333411	330499
41		S-20284	JOSEPH GAY OR STELLA GAY	1125133	1235628	1292574	1364934	389723	613861
43		S-52946	JOSEPH GAY (AS TRUSTEE FOR DOROTHY GAY)	496780	736357	773866	813411	—	—
45		S-52547	JOSEPH GAY (AS TRUSTEE FOR LORRAINE GAY)	496780	736357	773866	813411	—	
51		M-11604-G	JOSEPH GAY OR STELLA GAY (SPECIAL TERM)	—	—	—	—	12000 -	1291060
SUB-TOTAL				78760.82	9158578	9625123	10371392	2025792	5017130
			ERIE FEDERAL SAVINGS & LOAN						
# 58	STIP.- TEST. OF N. SGANGA	679-51419	JOSEPH J. OR STELLA GAY	1212023	1467520	1655156	1819091	153332	720209
60		CD-9041	JOSEPH OR STELLA GAY	—	—	—	—	1218284	1293610
SUB-TOTAL				1212023	1467520	1655156	1819091	1371616	2013819
			ERIE COUNTY SAVINGS BANK						
# 62	WITNESS N. VASSAR	106021	JOSEPH OR STELLA GAY (SAVINGS CERT.)	—	—	—	—	—	10000 00
SUB-TOTAL									10000 00
			CASH ON HAND						
TESTIMONY S/A KRYSZTOF	PER MR. GAY		CASH ON HAND	2000 -	2000 -	2000 -	2000 00	2000 -	2000 -
TESTIMONY S/A QUINN			ACCUMULATED CASH IN MATTRESS	11000 00	11000 00	11000 00	11000 00	1000 00	1000 00
SUB-TOTAL				13000 -	13000 -	13000 00	120[illegible] -	3000 00	3000 00
GRAND TOTAL - YEAR END BALANCES				11734828	14786577	165087 76	179390 29	41173 85	95772 53
LESS BEGINNING BALANCE				/	11734828	14786577	165078 84	179390 29	41178 85
INCREASE (DECREASE) IN BANK HOLDINGS					3051749	1722199	1431145	‹13821144›	54593.68

Government's Exhibit 159.

SUMMARY (OF SOURCES & EXPENDITURES OF FUNDS

GOV. EX. NO.	**EXPENDITURES OF FUNDS:**	1967	1968	1969	1970	1971	TOTAL
141	Bank Balance & Cash On Hand Increases - Year End	3081749	1722149	1431125	-0-	5459368	
145	Purchases of Government Bonds	—	—	—	17959624	—	
146	Purchases of Stocks & Bonds	815852	664298	4884725	1650231	2023550	
1[illegible]	Mutual Funds Reinvested - Dividends & Cap. Gains	180698	201677	344729	158513	75178	
107 - Testimony - S/A Quinn	Purchase of Real Estate	—	—	—	—	3000 -	
89 - & Stipulation	Purchase of Automobile	—	—	370662	—	—	
99-104-106 - Test. Frank [illegible]	Funds Invested in Mortgages & OTHER LOANS	—	7000 -	5000 -	1200 -	6000 -	
148	Paid Life Insurance Premiums	82610	228641	223984	210482	193174	
149	Federal Income & Soc. Sec. Taxes Paid	108147	345626	328665	389889	417477	
158	Itemized Deductions Per Tax Return	160798	196229	204585	237238	254085	
93	Miscellaneous - Legal Fee	—	—	—	500 -	—	
- Testimony - S/A Quinn	Purchase of Treasury Note	—	—	—	10000 -	—	
	Total Expenditures of Funds	4399854	3998640	8285550	21756037	9322833	47762923
	SOURCES OF FUNDS						
	Tax Return Items						
4-5-6-7-8	Adjusted Gross Income - Per Returns	15914 05	15217 21	17806 22	20046 58	23060 87	
	Funds Available from Capital Gains Transactions						
4-5-6-7	(Sales of Securities, Etc.)	12048 58	1581 72	7944 47	992 47	—	
4-5-6-7	Less Taxable Portion of Capital Gains in Adj. Gross I.	(4638 08)	(790 86)	(2099 48)	(491 23)	—	
4-5-6-7-8	Non-Taxable Dividends	1643 04	200 -	4229 41	200 -	2668 40	
143	Omitted Taxable Income - Interest	120 00	120 -	178 75	4336 73	7395 09	
144	Unreported Income - Dividends	—	590 50	—	2596 00	—	
	Non Tax Return Items						
140	Non-taxable Interest	—	—	—	—	548750	
141	Bank Balance & Cash On Hand Decrease - Year End	—	—	—	13821144	—	
142	Principal Payments Received on Mortgages	241[illegible]	449607	287115	422807	757550	
6 & 34-1	Non-taxable Insurance Proceeds	—	—	—	1394 00	—	
39 & 40	Funds From Parent	—	—	142762	—	—	
53	Inheritance	—	—	—	—	153968	
De. Ex. #16	Funds Received from Redemption of Treasury Note	—	—	—	—	10000 -	
- Testimony - S/A Quinn	Funds from Sale of Car	—	—	200 -	—	—	
	Total Sources of Funds	2750073	2141514	3256751	17139907	5771595	31059840
	Expenditures in Excess of Funds	1649781	1857146	5028799	4616120	3551237	16703083
	Taxable Income Reported	1321862	1216798	1343393	1653746	[illegible]	
①	Total Taxable Income	2971643	3073944	6372192	6269866	5479405	
	Total Tax Due	776941	878101	2663059	2433830	1954132	8703063
	Tax Reported	[illegible]	247465	288033	349575	417912	1559451
	Additional Tax Due	520475	630636	2375026	2084255	1536220	7143612

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff

-vs- CR-74-143

JOSEPH J. GAY,

Defendant

APPEARANCES: RICHARD J. ARCARA, ESQ.
United States Attorney
(RICHARD E. MELLENGER, ESQ., of Counsel)
Buffalo, New York, for the Government.

ROBERT M. MURPHY, ESQ., Lackawanna, New
York (R. WILLIAM STEPHENS, ESQ. &
ROBERT B. CONKLIN, ESQ., Buffalo, New York,
of Counsel), for Defendant.

On April 13, 1976 after a ten-day trial, the jury found the defendant guilty on five counts of violation of 26 U.S.C. §7201, tax evasion, for the years 1967-1971 inclusive. On April 19, 1976, after the defense filed motions for judgment of acquittal and for a new trial pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure, the court extended the time for consideration of these motions and directed preparation of the transcript and filing of briefs.

In considering these motions, the court must consider the evidence in the light most favorable to the Government. United States v. Taylor, 464 F.2d 240 (2d Cir. 1972). The court

> must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.
> Taylor, supra, at 243.

The court has had an opportunity to examine the transcript, the exhibits which are part of the record, and the briefs filed in support of the arguments for either side. The following constitutes the court's decision and order on the defendant's motions.

The Government proceeded on the "cash expenditure" theory which is described in Taglianetti v. United States, 398 F.2d 558 (1st Cir. 1968), aff'd 394 U.S. 316 (1969), as a "variant of the net worth method of establishing unreported taxable income." In that case, the court explained:

> Both proceed by indirection to overcome the absence of direct proof. The net worth method involves the ascertaining of a taxpayer's net worth

> positions at the beginning and end of a tax period, and deriving that part of any increase not attributable to reported income. This method, while effective against taxpayers who channel their income into investment or durable property, is unavailing against the taxpayer who consumes his self-determined tax free dollars during the year and winds up no wealthier than before. The cash expenditure method is devised to reach such a taxpayer by establishing the amount of his purchases of goods and services which are not attributable to the resources at hand at the beginning of the year or to non-taxable receipts during the year. The beginning and ending net worth positions must be identified with sufficient particularity to rule out or account for the use of a taxpayer's capital to pay for his purchases. If the end-of-year net worth position is equal to that at the beginning of the year, and if there are no non-taxable sources of income during the year, such as gifts or inheritances, the totality of the year's expenditures reflects total taxable income. If ending net worth shows an increase, the increase reflects an added component of income. Taglianetti v. United States, supra, 398 F.2d at 562, 563.

The United States Court of Appeals for the Second Circuit has discussed and approved the "cash expenditure" method in United States v. Bianco, 534 F.2d 501 (2d Cir. 1976), and United States v. Fisher, 518 F.2d 836 (2d Cir. 1975), cert. denied, 423 U.S. 1033 (1975).

The Government is required to establish with reasonable certainty an opening net worth. This "reasonable certainty" requirement is derived from the Supreme Court's opinion in Holland v. United States, 348 U.S. 121, 132 (1954). The court in Taglianetti explained it in this fashion:

> In a typical net worth case, as Holland, precise figures would have to be attached to opening and closing net worth positions for each of the taxable years to provide a basis for the critical subtraction. In a cash expenditures case reasonable certainty may be established without such a presentation, as long as the proof . . . makes clear the extent of any contribution which beginning resources or diminution of resources over time could have made to expenditures.
> Taglianetti v. United States, supra, 398 F.2d at 565.

See also United States v. Fisher, supra, 518 F.2d at 842 n. 7.

Without question, the instruction of the Supreme Court in Holland v. United States, supra, especially at 132 to 139, is controlling. In addition to establishing an opening net worth figure with reasonable certainty, the prosecution must investigate leads furnished by the taxpayer and, if it does not, its case must fail. It must show that the net worth increases in each year are attributable to taxable income and rule out non-taxable sources. As the *Holland* Court pointed out at 137, 138,

> Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. But proof of a likely source, from which the jury could reasonably find that the net worth increases sprang, is sufficient.

A few years later, the Supreme Court, in *United States v. Massei*, 355 U.S. 595 (1958), made a further explanation of the meaning of likely source, stating:

> In *Holland* we held that proof of a likely source was "sufficient" to convict in a net worth case where the Government did not negative all the possible nontaxable sources of the alleged net worth increase. This was not intended to imply that proof of a likely source was necessary in every case. On the contrary, should all possible sources of nontaxable income be negatived, there would be no necessity for proof of a likely source.

In *Holland*, the Court pointed out that

> where relevant leads are not forthcoming, the Government is not required to negate every possible source of nontaxable income, a matter peculiarly within the knowledge of the defendant.
> *Holland v. United States*, *supra*, at 138.

In this income tax fraud case, the Government proceeded in a traditional fashion. During their investigation, the agents interviewed Mr. Gay, who willingly discussed his affairs with them and gave them information. Following up the leads given by the defendant, the Government introduced at trial bank records, mortgage loans, security transactions and other dealings of the defendant for the years prior to and during the tax years. From these records the Government proceeded to establish an opening net worth which it argues was accomplished with reasonable certainty. At the end of the Government's direct case, a revenue agent calculated the amount of tax due using the cash expenditures method and referring to the records introduced in evidence and the witnesses' explanation of them. After giving Mr. Gay credit for amounts paid, the agent's calculations reveal that there was an additional tax due in the following amounts for the years set forth:

1967 - $ 5,204.75
1968 - 6,306.36
1969 - 23,750.26
1970 - 20,312.55
1971 - 15,362.20

If proven, these figures show a substantial loss of revenue to the Government.

The defendant urges a number of grounds why this conviction should be set aside. He asserts that the Government did not establish an opening net worth with reasonable certainty. According to defendant, the main fault with the Government's opening figure is that it only credited him with $2,000 cash on hand and did not take into account a large amount of additional cash he had at the beginning period.

Defendant further argues that the Government failed to show a "likely source" of income during the tax years and that it failed to track down leads furnished by him. Because of this failure, defendant claims that he was not credited with substantial income earned in the years prior to the indictment, with the result that this income was incorrectly attributed to the tax years.

In a supplemental memorandum, defense counsel briefly sketched the background of defendant, which was revealed at trial. Mr. Gay was born in 1914 under very modest circumstances and began work when he was thirteen in a printing shop. Shortly after his marriage in 193e, he opened a tavern with a $15,000 loan from his mother-in-law. He sold it for $65,000 in 1942, but his mother-in-law declined his offer of the return of the $15,000. After selling the tavern, he worked at defense plants in the Buffalo area during World War II. When the war concluded, he became a railroad switchman and continued his small printing business. According to Mr. Gay, he customarily kept his money in cash because he became suspicious of banks during the '30s. He explained his attitude toward banks in this way:

> I have been in the habit of keeping cash ever since the '40s. I feel safe with cash. I have always done the business, a lot of business in cash and I feel I should have it on hand whenever an opportunity arises I have it available. Transcript [Tr.] at 708.

In 1947, he became a salesman for a liquor company in Buffalo and continued this employment until 1953. During this period he continued in the printing business and also used available cash to finance private mortgages at the legal rate of interest. He also bought and sold some real estate.

In 1953, he resigned his job as a liquor salesman and spent more time in overseeing his investments. According to Mr. Gay, he also made real estate loans to family members, but no mortgages were recorded. He testified that, because of his own experience with his mother-in-law, trust alone was sufficient security. He continued his practice of keeping large sums of cash on hand until 1969, when three men forced their way into his home, assaulted him and demanded to know the location of his safe. They ransacked the house, took about $1,200 in cash and some other personal property, but did not find the cash horde. After this, he also learned from his wife that she kept about $10,000 in a purse in her bedroom. These monies were accumulated by her from savings from household expenses. With this $10,000 he bought a Government treasury bond. This purchase was duly credited by the agents as a non-taxable source of funds. According to Mr. Gay, because of this terrifying experience, he purchased about $200,000 in Government bonds and other stocks. However, the Government points out that there was a $138,000 decrease in his deposits at various Buffalo banks at the same time. (Exhibit 141).

The cash horde, then, becomes the principal issue in this case. According to the Government's calculations, the defendant's opening net worth on December 31, 1966 was about $245,000. This consisted of:

Cash on hand and at banks	$117,000.
Securities	84,000.
Mortgages	30,000.
United States Bonds	13,000.

Defendant agrees with these calculations, but argues that the Government does not go far enough. He claims credit for over $100,000 which he said was in a tin box in his basement.

During the June 8, 1972 interview, in discussing cash on hand, the special agent explained what he meant in this fashion, "any monies that were undeposited such as money he might have in his pocket, in his wallet, in his bureau drawer, in a cigar box, anything of this nature." Gay said that he had about $2,000 in cash lying around the house. Later, when he told the agents about the $10,000 he had received from his wife after the robbery, they also credited him with this amount. During trial, testimony about the cash horde was heard from the defendant's son-in-law, from his brother and from his two daughters. His son-in-law testified that after the robbery occurred in 1969, the defendant took him to the basement of his home where he showed him a tin box containing $110,000. Later, in 1970, when defendant took a trip to Spain, he asked his son-in-law to hold the box for him while he was gone. At that time the amount in the box was about $40,000. Defendant's daughters never saw the box, but he told them that if anything happened to him while he was gone, they should look around the house because there was some money in an attic crawlspace. However, they never saw the box and he never told them how much money was in it. The defendant's brother, Leonard Gay, testified that in 1956 his brother loaned him some money and at that time he took the money out of a tin box. Leonard Gay did not count the money, but he estimated that there was about $100,000 in it.

The Government argues that there was evidence which contradicted defendant's story. As to his testimony that he was fearful of banks and for that reason kept large amounts of cash in his house, the Government notes that on December 31, 1966 the defendant had over $104,000 in over fourteen bank accounts, and over $84,000 worth of securities in a variaty of corporations. He had been building up these investments over a number of years. When he received a principal payback on a mortgage, he almost invariably deposited the fund immediately in an interest-bearing account. These facts do not picture a person who was fearful of banks, but one who was conversant with their uses and regularly relied upon them.

Social Security Administration records reveal that from the early 1940s until 1966 the defendant earned only $63,000. It may be assumed that these sums would be used up in living expenses and that securities and other investments which the defendant had were as a result of his sale of the tavern business and careful investments made since the early 1940s.

The defense argument that the Government failed to check out leads provided by the taxpayer is without merit. During the conversations which Mr. Gay had with the agents, he told them about his brokerage accounts, bank accounts and the mortgage loans which he had given to various people. He was given credit by the agents for the money he had received from an insurance settlement, the funds from the distribution of an estate, money from an automobile accident settlement, and from the sale of an automobile. Evidence was received about savings bonds and other securities held by the defendant.

Although the Government carefully recorded and analyzed all of these transactions, including the principal paid back to the defendant because of mortgage transactions during the years in question, yet the defense argues that the Government failed to credit the defendant with information given on January 6, 1972 about principal mortgage paybacks which occurred in the 1950s and 1960s prior to indictment years. The defense argues that the defendant failed to get credit for these principal mortgage paybacks because the Government assumed that the money received by the defendant from these mortgagees was deposited in bank accounts.

If we assume that the defendant is correct and no credit was given to him because of this, then these monies became part of his cash horde, or were used for subsequent mortgage transactions. If these monies were reinvested in subsequent mortgage transactions, then the defendant received credit for that use when the agents analyzed the subsequent transactions. By its verdict, the jury implicitly rejected the cash horde claim.

The defendant cannot now complain about not receiving credit for family mortgage transactions which were not recorded. The agent questioned him about transactions like this during the interviews and he said that there were none. The jury listened to his testimony and the testimony of his family on this point and evidently rejected it.

The Government has sufficiently met its burden of proving likely source of income. The leads furnished by the defendant were tracked down as far as the agents could do so under the circumstances. From his earliest years, the defendant had a small printing business. While that business did not appear to be a large source of income, in addition he had been engaged in numerous investment transactions over many years. It is reasonable to assume that this acumen would continue through the tax years. Proof of a "likely source" of income in this case meets the standards set in *United States v. Massei*, *supra*, and *United States v. Holland*, *supra*.

On every point urged by the defendant, the issue was submitted to the jury and evidently rejected in its verdict. The defendant's own business dealings and habits contradict his assertion that he was fearful of banks and kept large sums of money at home. The agent's explanation to the defendant of the meaning of cash horde was clear and detailed. There was no reason for the agent not to believe Mr. Gay when he estimated $2,000 as cash on hand as of December 1966, or for the jury not to believe that to be the truth after it had listened to all of the testimony. Considering the standard to be applied, the defendant's motions must fail and are denied.

Sentencing is set for June 13, 1977 at 9:00 a.m.

So ordered.

John T. Curtin
JOHN T. CURTIN
United States District Judge

DATED: May 5, 1977

Judgment of Conviction.

United States District Court for

United States of America vs.

DEFENDANT: JOSEPH J. GAY

WESTERN DISTRICT OF NEW YORK

DOCKET NO. CR. 74-143

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date: MONTH July DAY 21, YEAR 1977

COUNSEL

☐ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL Robert Murphy, Esq. (Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea, ☐ NOLO CONTENDERE, ☐ NOT GUILTY

FINDING & JUDGMENT

There being a ~~finding~~/verdict of
☐ NOT GUILTY. Defendant is discharged
☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of filing false and fraudulent joint income tax returns, in violation of Title 26, U.S.C., Section 7201.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby ~~[illegible]~~ sentenced as follows: defendant is placed on probation for a period of three years. On Count 1 defendant is fined $5,000.00. On Count 2 defendant is fined $7,500.00. On Count 3 defendant is fined $7,500.00. On Count 4 defendant is fined $7,500.00. On Count 5 defendant is fined $7,500.00. Total amount of fine is $35,000.00. A condition of probation is that the fine be paid within 30 days.

SPECIAL CONDITIONS OF PROBATION

FILED
JUL 28 1977
AT 12:45 PM
JOHN K. ADAMS Clerk

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
U.S. District Judge

John T. Curtin
JOHN T. CURTIN, U.S. District Judge

Date July 21, 1977

AFFIDAVIT OF SERVICE BY MAIL

RE: U.S.A.
vs
Joseph J. Gay

No. 77-1369

State of New York)
County of Genesee) ss.:
City of Batavia)

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 8th day of September, 19 77 I mailed ______ copies of a printed Appendix in the above case, in a sealed, postpaid wrapper, to:

10 copies to: A. Daniel Fusaro, Clerk
U.S. Court of Appeals, Second Circuit
New Federal Court House
Foley Square
New York, New York 10007

2 copies to: Richard J. Arcara, U.S. Attorney
Att: Richard D. Mellenger, Assistant U.S. Attorney
502 U.S. Courthouse
Buffalo, New York 14202

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Raichle, Banning, Weiss & Halpern, Att: R. William Stephens, Esq.

10 Lafayette Square, Buffalo, New York 14203

Leslie R. Johnson

Sworn to before me this

8th day of September, 1977

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19 79